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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

TUCKER *v.* BENNETT.

[1885 T. 1252.]

C. A.
1887
Nov. 28, 29;
Dec. 17.

Marriage Settlement—Rectification—After-acquired Property—Wife's Power of Appointment—Agency of Wife's Father.

A father living on affectionate terms with his daughter is the proper person to recommend and advise her, and her natural agent in matters relating to the preparation and provisions of her marriage settlement, and there is no occasion for any independent legal advice beyond that of the family solicitor who is preparing the settlement. If, however, the father is taking under the settlement a benefit from the daughter, she ought to be separately advised.

Per Cotton, L.J.—The Court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage, the principles on which it would act in considering provisions contained in a voluntary settlement.

The decision of *Kekewich*, J., reversed (Sir *J. Hannen dissentiente*).

Smith v. *Iliffe* (1) disapproved.

Wollaston v *Tribe* (2) doubted.

THIS was an appeal from a decision of Mr. Justice *Kekewich* (3).

In the year 1871 the Plaintiff, *Mary Tucker*, then *Mary Bennett*, was married to the Defendant *J. D. Tucker*. On the treaty for the marriage *T. O. Bennett*, the father of the Plaintiff, agreed to

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(1) Law Rep. 20 Eq. 666.

(2) Law Rep. 9 Eq. 44.

(3) 34 Ch. D. 754.

G 1 S

settle for her benefit a sum of £1000, and the Defendant *J. D. Tucker* agreed to settle the sum of £2000.

The settlement was dated the 26th of July, 1871, and was made between the Defendant *J. D. Tucker* of the first part, the Plaintiff of the second part, and the Defendants *William Bennett* and *A. C. Tucker*, who were the trustees thereof, of the third part. And after reciting that in pursuance of the above-mentioned agreement *T. O. Bennett* had transferred into the names of the trustees the sum of £1070 Consols, and that *J. D. Tucker* had transferred into the names of the trustees the sums of £1460 *East India Railway* stock and £500 *Great Indian Peninsular Railway* debenture stock, and after usual trusts for investment, it was thereby agreed that the trustees should pay the income of the said consols and the investments thereof to the Plaintiff during the joint lives of herself and the said *J. D. Tucker*, for her separate use without power of anticipation, and after the death of either of them, to the survivor during his or her life; and should pay the income of the railway stock and railway debenture stock, and the investments thereof, to the Defendant *J. D. Tucker* during their joint lives, and after the death of either of them to the survivor during his or her life; and after the death of the survivor should hold all the trust funds in trust for the issue of the then intended marriage to be born during the lives of the said *J. D. Tucker* and the Plaintiff, or the survivor of them, or within twenty-one years after the death of such survivor, as *J. D. Tucker* and the Plaintiff should by deed jointly, or the survivor should by deed or will appoint: and in default of such appointment for the child or children of the marriage in equal shares if more than one, sons at twenty-one, and daughters at twenty-one or marriage: and if there should be no child who being a son should attain twenty-one, or being a daughter should attain that age or marry, it was declared that the trustees should hold the consols and the investments thereof after the death of the Defendant *J. D. Tucker* and such default of children, in trust for such person or persons as the Plaintiff should by will appoint, and, in default of such appointment, if she should survive the said *J. D. Tucker*, then in trust for her, her executors, administrators, and assigns. But if the said *J. D. Tucker* should survive the Plaintiff, then in trust for such person or persons as, under the statutes for the distribution of the effects of intestates, would have become entitled thereto at the death of the Plaintiff if she had died intestate and without having been married. And as to the said railway stock and railway debenture stock, and the investments thereof, after the death of the Plaintiff and such default of children as aforesaid, in trust for the said *J. D. Tucker*, his executors, administrators, and assigns.

The settlement then contained the following provision with reference to the after-acquired property of the wife. It was thereby further agreed and declared by the parties thereto that in case the Plaintiff then was, or if during the said intended coverture she or the said *J. D. Tucker* in her right, or if after her death the said *J. D. Tucker* in her right, should at one time and from one source become legally or equitably possessed of or entitled to any real or personal property of the value of £200 or upwards for any estate or interest whatever (with the usual exception) then and in every such case the said *J. D. Tucker*, the Plaintiff, and all other necessary parties, should from time to time do all acts and things necessary in order to vest the same in the trustees of the settlement upon trust to sell and convert the said property, as therein mentioned, and should stand possessed thereof upon the trusts and with and subject to the powers and provisions thereinbefore declared concerning the said sum of consols and the investments thereof; save and except that the trustees should during the life of the Plaintiff pay the annual income thereof to such person or persons as she should, but not by way of anticipation, appoint, and in default of appointment into her proper hands for her separate use; and from and after her decease should stand possessed thereof in trust for the issue of the Plaintiff by the said then intended or any future marriage in such manner as she should by deed or will appoint, and in default of such appointment in trust for all the children or any child of the Plaintiff by the said then intended or any future marriage, who being sons should attain the age of twenty-one or being daughters attain that age or marry, and if more than one in equal shares, and if there should be no child of the Plaintiff who being a son should attain twenty-one, or being a daughter should marry, then in trust

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for such person or persons as under the statutes for the distribution of the effects of intestates would have become entitled thereto at the decease of the Plaintiff had she died possessed thereof intestate and without having been married.

Under this provision the Plaintiff had, it will be seen, in default of children no power of appointment over her after-acquired property nor any absolute trust in her favour of such property in case she survived her husband—and it was this circumstance which gave rise to the present action.

The Plaintiff was twenty-two years of age at the time of the marriage, and living with her father on terms of affection and confidence. The settlement was prepared by her brother, the said *William Bennett*, who was a solicitor, from instructions given to him by *T. O. Bennett*, the father, who acted as his daughter's agent in the matter.

The evidence as to the circumstances attending the preparation and execution of the settlement, and as to the extent to which its provisions were explained to and understood by the Plaintiff, and upon the question whether she had actually constituted her father her agent in the matter, will be found in the judgments of Lord Justice *Cotton* and Lord Justice *Lopes*.

At the time of the marriage the Plaintiff was entitled under the will of her maternal grandfather, in reversion expectant on the death of her mother (since deceased), to between £800 and £900, and she also had expectations of larger benefits from her father. Her father, *T. O. Bennett*, died in December, 1878, having by his will, dated in August, 1877, directed his trustees to pay to the trustees of the Plaintiff's marriage settlement £1000, to be held by them on the trusts of the settlement, and after the death of his wife to pay one-third of a sum of £3000 to the trustees of the Plaintiff's marriage settlement; and after giving benefits to his wife, his three sons, and his other two daughters, he gave the residue of his estate in trust for all his children living at his decease equally, and the issue of any of them who might be then dead, such issue to take by substitution the parent's share.

It appeared that Mr. *T. O. Bennett* had previously to the Plaintiff's marriage made a will whereby he had given a share of his property to the Plaintiff upon trusts similar to those in the marriage settlement concerning the after-acquired property, except that the ultimate limitation was to the Plaintiff's surviving sisters and not to her next of kin. And there was evidence that in making his second will he was influenced by his knowledge of the terms of the settlement.

In July, 1885, there having been no issue of the marriage between the Plaintiff and the Defendant *J. D. Tucker*, the Plaintiff brought this action against the said *William Bennett* (as trustee and individually and also on behalf of himself and all other persons then presumptively entitled or to become entitled as next of kin of the Plaintiff under the trusts of the settlement), and against the said *A. C. Tucker* and *J. D. Tucker*, and alleged that she had had no independent legal advice concerning the said settlement, that the provisions respecting her other and after-acquired property were not explained to her, and that she was not told, and did not understand, that such provisions were of an unusual character, or that the effect of the settlement was to deprive her of any power to dispose of the same in the event of her having no issue, or that under such trusts her husband would not take any life interest in such other or after-acquired property, and that she had no power to confer on her present or any future husband a life interest in such property. And she submitted that the settlement ought to be rectified "either by striking out the said agreement for the settlement of any other and after-acquired property of the Plaintiff, or by inserting before the ultimate trusts of such property in default of issue the usual trusts (in case of such default) enabling the Plaintiff to appoint such property by will, with a trust in default of appointment for the Plaintiff absolutely in case she shall survive the Defendant *J. D. Tucker*, and also by inserting a power in the usual form for the Plaintiff in any event by will to appoint a life interest in the same property in favour of her present or any after-taken husband." And she claimed such rectification accordingly.

William Bennett was appointed to defend this action on behalf of himself and the other persons presumptively entitled as next of kin of the Plaintiff, who were her brothers and sister.

The action came on for trial before Mr. Justice *Kekewich* in January, 1887, and His Lordship, chiefly on the grounds that a father is not the natural agent in making a settlement for a daughter engaged to be married, and about to settle property coming to her through him, and that this settlement was in an unusual form and the Plaintiff was not separately represented, rectified the settlement by giving the Plaintiff, in default of children, a power of appointment by will over the after-acquired property in the event of her dying in the lifetime of her husband, and giving her an absolute interest in such property in the event of her surviving him.

From this decision the Defendant *W. Bennett* now appealed.

B. B. Rogers, in support of the appeal:—

The learned Judge in the Court below has apparently considered that the Court ought to make what it thinks a proper settlement; but the Court cannot rectify a settlement except upon evidence that the deed as executed does not carry out the intention of, and the contract between the parties. Here there is no evidence whatever of any intention or contract, except what was carried out by the settlement. The father was a land agent who had acquired a considerable property which he was anxious should not go out of his family, and nearly the whole of the property comprised in the settlement was coming from him. As the settlement was originally prepared it gave the lady no power of appointment in default of children, either as to the money settled by the father, or as to the wife's after-acquired property, but it was altered so as to give the lady such a power as to that actually settled. The only question is, whether the lady was specifically told of the provisions as to the after-acquired property. And I submit, first, that the father was her natural agent in the preparation of the settlement, and that the intervention of another separate solicitor, besides the family solicitor, in order to protect the lady against her own father, was entirely unnecessary; and secondly, that upon the evidence the lady actually constituted her father her agent *ad hoc,* and that the provisions as to the after-acquired property were explained to, and discussed with her.

Warmington, Q.C., and *Mitchell*, for the Respondent:—

This settlement is not in the usual form, and Mrs. *Tucker* ought to have had reserved to her a power of appointment over the after-acquired property in case she had no children, and a trust in her favour in default of appointment. The only persons whose interests could be said to be defeated by the insertion of such a power are the next of kin of the settlor, who, being collaterals, are mere volunteers, outside this marriage consideration. Mrs. *Tucker* did not know and did not have explained to her the effect of the non-insertion of this power, and the case must be treated as one of a voluntary gift to collaterals, which may be set aside by the settlor as not intended to be irrevocable: *Wollaston* v. *Tribe* (1); *Smith* v. *Iliffe* (2). The same principles were applied in *Welman* v. *Welman* (3), where the effect of the settlement was not brought home to the mind of the father and son; and also in *James* v. *Couchman* (4). A voluntary settlement, in order to be supported in this Court, must express the mind of the settlor, and if as between the settlor and his gratuitous donee it can be established that the latter has something the settlor did not intend him to have, the settlor is entitled to have the settlement rectified, and the donee has no *locus standi* to resist it. If the clause had been purchased by the father's gift of £1000 the case might be different, but there is no trace of any bargain of that kind. Here, while the lady is not shewn to have any knowledge of the unusual character of the terms of the settlement, the father could not properly act as her agent in the preparation of it, at all events as regards the after-acquired property, for he had in fact a distinctly conflicting interest, and the lady should have been protected by independent advice. The Plaintiff is accordingly entitled to have the settlement rectified.

[They also referred to *Phillips* v. *Mullings* (5); *In re Michell's Trusts* (6); *Attorney-General* v. *Read* (7); *In re Anstis* (8).]

Eve, for Mr. *Tucker* and the other trustees.

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(1) Law Rep. 9 Eq. 44.
(2) Ibid. 20 Eq. 666.
(3) 15 Ch. D. 570.
(4) 29 Ch. D. 212.
(5) Law Rep. 7 Ch. 244.
(6) 9 Ch. D. 5.
(7) Law Rep. 12 Eq. 38.
(8) 31 Ch. D. 596.

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B. B. Rogers, in reply, cited *In re Suggitt's Trusts* (1); *Croxton* v. *May* (2); *Hall* v. *Hall* (3); *Mackie* v. *Herbertson* (4).

1887. Dec. 17. COTTON, L.J.:—

This case was argued some time ago before Sir *James Hannen*, myself, and Lord Justice *Lopes*. Unfortunately Sir *James Hannen* cannot attend to-day, but he has sent a memorandum of his judgment which Lord Justice *Lopes* will read after I have delivered mine. [His Lordship then shortly stated the facts of the case, and the provisions of the settlement, and continued:—]

Mr. and Mrs. *Tucker* were married; they had no children, and then, under these circumstances, the lady is not satisfied with the provision as to after-acquired property, and brings this action in order to have the settlement rectified either by striking out the agreement for the settlement of after-acquired property, or by inserting before the ultimate trusts in default of issue trusts enabling her to appoint such property by will, with a trust in default of appointment for her absolutely in case she survives her husband, and a power to appoint a life interest in the same property in favour of her present or any after-taken husband. Mr. Justice *Kekewich*, though he altered the settlement, did not go to that extent, but what he did was this—in default of there being children of the present marriage, he gave power to the Plaintiff, as she desired, to appoint by will, and in the event of her surviving her husband an absolute property.

I do not know that he quite contemplated that he was interfering with and destroying, or giving the wife power to destroy, the trusts in favour of the children of any future marriage, but that was his judgment.

I feel some difficulty in understanding the course that was taken in this case when before Mr. Justice *Kekewich*; because it seems that on the case being opened he threw upon the Defendants, the trustees of the settlement, the onus of shewing why the settlement should not be altered. He did not like the trusts of the settlement, and as the lady wished them to be altered, and the husband, to whom no direct benefit was given, did not

(1) Law Rep. 3 Ch. 215.
(2) Ibid. 9 Eq. 404.
(3) Law Rep. 8 Ch. 430.
(4) 9 App. Cas. 303.

object, he apparently thought it rather lay upon those who supported the settlement to shew why it should not be altered. But it is not for this Court to take upon itself to say whether it would have made a different marriage contract from that which was in fact embodied in the deed executed by the parties. The contract is their contract. It lies on those who seek to alter the instrument to shew why it should be altered, not on those who support it, to shew why it should not be altered; and what His Lordship seems to have considered, as I understand it, is, that it was the duty of the father in making, or in giving instructions for the preparation of this settlement, to see that, at any rate as regards the disposition of the after-acquired property of the wife, there should be a separate solicitor employed on her behalf to protect her interests and to see that she did not lose any right in this after-acquired property which might be secured to her by the settlement. It must be borne in mind that this settlement of after-acquired property is in reality a giving up by the husband of the rights which he obtains by marriage in after-acquired property. It is true there was an agreement by the wife to settle, but then that would affect only such property as she took for her separate use.

Now, in my opinion, the view so taken by the learned Judge is a wrong view. I do not think that it is at all the duty of a father when he is making a settlement upon his daughter, to see—either as regards the property which he is giving, or as regards the after-acquired property—that his daughter is separately represented, so that she may have a separate solicitor as her adviser. It is certainly contrary to any experience I have myself, and I think it is importing from a different class of cases the considerations which have been there looked to by the Court. If there is a disposition of the child's property for the benefit of the father, then undoubtedly it lies on the father to shew—he being in a position capable of enabling him to exercise great influence over his child—that the child is well advised, and is separately advised from the father.

What are the circumstances of the case? The argument here was this; it was argued that the next of kin who could claim under the *Statute of Distributions* were the only persons who could be defeated by the exercise of this power, and must be treated as volunteers, and therefore that in considering the question you must apply to the trusts relating to these persons the same principles as the Court applies to provisions in a deed which is entirely an act of bounty, and a voluntary deed.

Now, as regards the children of a future marriage there is a decision strongly against that; for, what is meant by volunteers? Probably, and as I think it was put, by volunteers is meant persons at whose suit the Court would not enforce a contract as against the settlor. If there is a contract for value, then, with the exception which I shall mention, no person who is not a party to the contract can enforce it. But there is an exception. There is an old-established exception, that in a marriage settlement the children of the marriage can enforce it, although, of course, they could not by possibility be parties to the contract; and there is a decision of Lord Justice *Fry*, when Judge of first instance, in *Gale* v. *Gale* (1), where he extended that exception so as to allow children of a former marriage to enforce a settlement made by their mother when she was entering into a second marriage, and he relied upon a decision of Lord *Hardwicke* in *Newstead* v. *Searles* (2), where the question was slightly different, namely, whether, as regards persons not children of the marriage, the limitation in their favour could be considered as voluntary so as to be defeated by a purchaser on a subsequent sale for value; and Lord *Hardwicke* decided in the negative.

But, I do not go upon that point. What I look upon is this—that it is a mistake altogether to apply to a provision in a marriage settlement, although one of a voluntary character, the same rules as the Court acts upon in considering whether a voluntary deed is one which the settlor can set aside.

The covenant as to future property was undoubtedly, as I think I shall shew presently, one of the stipulations contained in the contract, the terms of which were settled on behalf of the intended wife by her father with the intended husband. And if it is one of the stipulations of the contract, it is in my mind a mistake to say that this is altogether an act of bounty by the settlor, which is to be set aside if the wife shews either that she

(1) 6 Ch. D. 144.

(2) 1 Atk. 265.

did not understand it, or that she was not properly advised as to the effect of it. On that point I may refer to a case somewhat similar to that before Lord *Hardwicke*, namely, *Clarke* v. *Wright* (1), where Lord *Blackburn* and *Willes*, J., and also *Cockburn*, C.J., agreed in deciding that a limitation to the illegitimate son of the wife, being the settlor, was not void so that a subsequent purchaser for value could defeat it. There Lord *Blackburn*, in delivering his judgment, made observations which should be borne in mind in dealing with a case like this. His Lordship said (2): "The marriage bargain is like any other mutual agreement in which there are many terms,—the promise by the one party to be bound by all the terms as a consideration for the promise of the other party to be bound by all the terms, so that none of them are without consideration; though it would be quite possible that other matters mentioned at the same time were not made part of the terms of the bargain and were therefore, without consideration." That case related to real estate, and its circumstances were different from those of the present; but to my mind it applies to cases where there has been a bargain between the parties. Although some of the persons who take a benefit from the bargain cannot actively enforce it against the parties to the contract, yet you cannot, in my opinion, look at any of the terms of that contract as matters to be dealt with just as if there were no contract at all; just as if the settlement or the provisions in question were contained in a deed which proceeded entirely upon the bounty of one of the parties.

Now if we had to decide here whether the lady did in fact know of these provisions, I should come to the conclusion upon the evidence—and Lord Justice *Lopes* takes the same view—that she did in fact know of them. She does not say that she did not know of them, and there is a conversation spoken of by her elder brother in which she says that he did explain to her that in the event of her not having children the property would go back to her brothers and sisters. Those were then the persons who would be her next of kin after her father's death. It was not contemplated that the father would survive her. She does not deny that she had that conversation: all she says is this: "I did not

(1) 6 H. & N. 849.

(2) 6 H. & N. 863.

intend to ignore my husband." This clearly shews that it was known to her that the matter was under consideration, and what she says now is that she did not think that her husband would be excluded by the terms of the settlement made. The father acted for his daughter. *William*, the younger brother, who was a solicitor, rather unfortunately took upon himself to prepare the settlement, as he thought in accordance with his father's views. He originally prepared the settlement, not giving, as regards the ultimate limitations of the property then settled by the father, any power of appointment to the wife, but the husband suggested that the wife should have that power generally. It was brought to the father's attention. The father objected, then yielded as regards the £1000, but declined to yield as regards the after-acquired property, and said: "There cannot be introduced any power given to the wife which will enable her to take this away from her own father and give it to her husband or anybody else." That shews that it was distinctly part of the bargain which was entered into on behalf of the lady by her father. She trusted her father, and in my opinion rightly, and although some people might say that this was not such a settlement as they would have advised or executed, yet, in fact, it was made without any evil intention, without any intention to deprive her of a power which she ought to have, and was insisted on by the father at the time when he was negotiating with the intended husband as to the terms of the settlement. Mr. Justice *Kekewich* does not find, and this is, I think, a material circumstance, that the lady did not in fact know of this term of the settlement. If he had done so after having seen the witnesses, there would be a difficulty in coming to a contrary conclusion; but I do not base my decision on this ground. I decide the case upon the ground that the lady knew that her father was negotiating with her intended husband; that, as she herself says, she entirely trusted her father to do what was best, and that she knew there was consideration of the question as to how her property should be settled in the events which have happened, and that in those events, though she did not wish to ignore her husband, it should go to her next of kin excluding him. After this length of married life she is now willing to do what she can for her husband, but we cannot on that ground alter the deed entered into and executed by the parties, without its being shewn that at the time when that deed was executed there was some definite arrangement in accordance with which the settlement ought to have been prepared as it is now desired to rectify it.

Mr. Justice *Kekewich* does not say that he disbelieves any of the witnesses, and unless we are to disregard all the evidence we must come to the conclusion that the ultimate limitation as it now stands was a matter insisted upon by the father, and known by him to be inserted in the settlement. And it seems to me not to be unreasonable that this should be so, for although the lady had reversionary property which did not come to her from her father, and has since fallen in, what was then contemplated was, no doubt, property which would come to her from her father, because, as she admits, though she did not rely upon any positive statement of her father, she understood that she and the other members of the family would at his death share equally in his property. That may account, if it is necessary to do so, for the father desiring that there should be a provision that, if his daughter was to have property from him, it should not go away from his family, but if there were no children of the marriage should go to his own family. There is no suggestion of any other intention than this. According to the evidence, on the morning of the marriage, when the settlement was being executed, the lady asked her brother *William* whether it contained the usual provisions. She says that she asked him "Is it all right?" and he said "Yes." Undoubtedly it was right in accordance with the instructions given by the father, who was acting for his daughter in the usual way in which a father would act under such circumstances. And in what she says there is nothing at all to contradict it, or shew that he was not acting for the best. She said, "I trusted my father to do what he thought best."

I will now refer to the two cases which were cited by Mr. *Warmington.* One of them, *Smith* v. *Iliffe* (1), before Vice-Chancellor *Bacon,* is to my mind a somewhat extraordinary case, and unless it can be explained in some way which is not apparent, I should

(1) Law Rep. 20 Eq. 666, 668.

not agree with it. In that case there was a marriage of an infant ward of Court long before the *Infants' Settlement Act*, and the settlement was one which the husband was required to make, depriving him of the rights which he would otherwise get by the marriage. But after some years the lady came and said this was not what she intended. That really could not alter the settlement. It was not her settlement; it was a settlement insisted on by the Court for her, and I think it is evident that the matter could not have been presented to the Vice-Chancellor in such a way that he could consider whether under the circumstances it would be right to vary the settlement. For what he said was this: "The case before the late Master of the Rolls of *Wolterbeek* v. *Barrow* (1), though it proceeded on facts which are not present here, is an authority as to the jurisdiction of the Court." Now what was *Wolterbeek* v. *Barrow*? It was a case where, on the instructions for the settlement being produced, it was found that they were contrary to what was contained in the deed executed. Now no one for a moment doubts that where it is shewn that the actual contract and intention of the contracting parties was different from that which is expressed in the deed, the Court has jurisdiction to alter it. But there is an enormous difference between altering a settlement under these circumstances, and altering a settlement where there is no evidence whatever that there was a different intention at the time when the deed was executed, as is the case here.

In my opinion we cannot consider that the case of *Smith* v. *Iliffe* (2) in any way supports the contention of the Respondent here. And if it intended to lay down as regards settlements any different principle from that which has hitherto prevailed, all I can say is that, with great respect to the Vice-Chancellor, I cannot follow *Smith* v. *Iliffe*. The other case to which Mr. *Warmington* referred in support of his contention was *Wollaston* v. *Tribe* (3). That was also the case of a marriage settlement, and there some years after the marriage, there having been no children, and the husband being dead, the lady came and gave evidence shewing that her instructions to her solicitor (she being apparently the only person

(1) 23 Beav. 423.

(2) Law Rep. 20 Eq. 666, 668.

(3) Law Rep. 9 Eq. 44.

who had taken part in the negotiations for the settlement) were not in accordance with the terms of the settlement. If the Master of the Rolls thought the evidence was uncontradicted and sufficient it would be right to so decide, but I should very much hesitate to say that it was really acting in accordance with the principles which the Court has acted upon. It requires very clear and distinct evidence to shew that there was some different intention at the time when the settlement was executed, and, with the exception of this, there is hardly a single case where many years after the settlement was executed, on mere parol evidence, uncontradicted because there was no one to contradict it, the Court has altered a deed because one of the parties afterwards desired that it should not stand as it was executed.

In my opinion these cases, even treating them as good authorities, will not support the contention of Mr. *Warmington;* and I think that the judgment of Mr. Justice *Kekewich* ought to be reversed.

Lopes, L.J., then read the judgment of Sir James Hannen, which was as follows:—

I think that the decision of this case turns upon the answer to be given to the question whether the Plaintiff was informed of and assented to the settlement being drawn in such a way as in the events which have happened would prevent her having the power to dispose of her after-acquired property. This is a question of fact which the Judge had to determine upon a consideration of the testimony of all the witnesses whom he heard and saw at the trial, and, after reading all the evidence, I am not prepared to say that the conclusion at which Mr. Justice *Kekewich* arrived is incorrect.

Lopes, L.J.:—

This is an action brought by Mrs. *Tucker* to have her marriage settlement dated the 26th of July, 1871, rectified by introducing language, which, with regard to the after-acquired property will give her a power of appointment by will, in the event of her dying in the lifetime of her husband, and an absolute property in the event of her surviving him.

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In my opinion, it requires strong evidence to justify the rectification or setting aside of an instrument under seal; and when that instrument is a marriage settlement the Court is bound to act with extreme caution, because it is impossible to recall the marriage, or to remit the parties to the same position in which they were before the marriage.

The Court must look at the intention of the parties at the time when the deed was executed, and not what would have been their intent if, when they executed it, the result of what they did had been present to their minds.

The terms of the settlement have been fully gone into, and I need not restate them. It was contended that the settlement could not be rectified on several grounds, all of which Mr. Justice *Kekewich* has decided against the Defendant.

Taking the view I do of the evidence it is immaterial to consider those grounds. I only propose to allude to one of them. It was contended that the father was not the agent of the daughter in making the settlement. Mr. Justice *Kekewich* says, "It has been argued strenuously, and with apparent confidence, that, in a case like this, the father is the natural agent for a daughter engaged to be married, and about to settle property coming to her through him. So far as I am concerned I think the sooner any such notion is dissipated the better. I think the father is the natural agent of the daughter for many purposes, for instance to receive either directly or through the solicitor of the husband the husband's proposals, to submit either through his solicitor or directly the proposals on behalf of the daughter, and it may be that until a very late period it is not necessary, or in some cases not even desirable, that the daughter should be separately represented, and have some person acting for her protection to see that what is right is done for her. But undoubtedly at some time or other the daughter should be represented in that way, and at some time either a legal adviser, or somebody competent to take his place, should step in, and say whether the proposals and the way in which the proposals are carried out in the settlement are right and proper in the daughter's interest. I cannot doubt or allow it to be doubted, and my experience certainly is, that that is done in such cases when business is properly

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conducted in a business-like manner, and it seems to me to be only right and proper."

I read this passage at length because I think it has influenced the Judge's mind in coming to his decision. He evidently thinks that a daughter about to be married ought at some time to be separately represented by a solicitor or legal adviser to protect her interests, and that when all the property about to be immediately settled is coming from the father, and the father and daughter are living on the most affectionate terms.

I entirely dissent from the view of the learned Judge. Is it to be said, when a man's daughter is about to be married that in addition to the family solicitor, who generally prepares the settlement, another solicitor is to be employed to watch the daughter's interests and protect her against her own father?

A father living on affectionate terms with his daughter is the proper person to recommend and advise her, and her natural agent in matters relating to the preparation of her marriage settlement, and in my opinion there is no occasion for any independent legal advice beyond that of the family solicitor.

But it is not a case of natural agency here. There is express evidence of actual agency. The Plaintiff herself unreservedly says in her evidence, "I trusted to my father to do what he pleased and what he thought right." "I left it entirely to my father."

The Plaintiff was twenty-two years of age, was the amanuensis of her father, and her relations with him were exceptionally confidential.

I cannot understand how in these circumstances it can be said that the father was not the agent of the daughter, so as to bind her to the settlement, even if it had not been explained to her, and if she had not thoroughly understood and assented to it. But was the settlement explained to her, and did she understand, and was it her intention that she should have no power in default of issue of disposing of the after-acquired property, and that after her death it should go to her next of kin?

It appears to me the evidence is all one way; I have read it carefully more than once.

I cannot see that the learned Judge considered the question of her intention at the time. Nor does he find one way or another on this most important point.

The case was not conducted in the regular way. At the end of the opening of the Plaintiff's case the learned Judge called upon the Defendants, and the Plaintiff was called on in reply.

Mr. *W. Bennett* was the first witness called. He says on the occasions when he went to *Bruton* to see his father about the settlement he always discussed the settlement with his sister; he says he explained to her the trusts of £1000, and also the trusts of the after-acquired property; he discussed all the trusts of the settlement with her. He says he explained to her that he had had an interview with her father in consequence of a letter from her intended husband, and that he had done his best with his father to induce him to give the power of disposition, but that he could not get him to do so beyond the £1000; that he did all he could in the matter at the time to get his father to extend it, but he would not; and then he says, "I explained all this to my sister."

Thomas Bennett is also called, and he confirms his brother's testimony in every respect; and, amongst other things, he says that his sister, when he explained what was done with regard to the after-acquired property, said she thought it was quite right if she had no children that her after-acquired property should go to her brothers and sister. The evidence of neither of the brothers is displaced in cross-examination.

Mrs. *Tucker* is called in reply. She does not contradict this evidence of her brothers, but she says: "I don't remember saying I thought it was right if I had no children that the money should go back to my brothers and sisters. I may have said so. I did not intend to ignore my husband."

If the evidence is believed, in my opinion it is impossible to come to any other conclusion but that the settlement was fully discussed with the Plaintiff and explained to her, and that she well understood that if she had no children the after-acquired property would go to her relatives; and that it was her intention that this should be provided for in the settlement.

But it is suggested that the learned Judge did not believe the witnesses for the defence. I know no reason why he should not.

It appears to me that he forgot the long time that had elapsed since *William Bennett* prepared the settlement, and sometimes he appears to attribute to the witness a desire to evade the question, when in truth the witness is over-anxious to be accurate.

But the learned Judge does not say he disbelieves the witnesses; on the contrary, he says, in the last passage of his judgment: "I am satisfied that every one desired and intended to act honestly as regards the others. I do not think that any one is to blame except for an excess of kind intention not pursued in a practical and convenient manner, and therefore I am very unwilling that any party should suffer in the matter of costs on account of such mistakes." What mistakes? I presume the learned Judge must mean mistakes in not employing an independent solicitor for the daughter. With regard to this matter, I have already expressed my opinion. If the learned Judge means mistakes in the evidence of the two *Bennetts* I do not follow him. They gave evidence of facts and conversations specifically. They could not be mistaken. They were either telling the truth or saying that which was false. I do not think the learned Judge can be referring to their evidence with regard to what took place between them and the Plaintiff about the settlement, for, as I have said before, he does not in his judgment deal with the Plaintiff's intention at the time, a matter, to my mind, all important in this case.

Probably the Plaintiff when the settlement was prepared and executed expected that there would be children of the marriage, and it may be she did not appreciate the result of what was being done in respect of the after-acquired property; but this will not avail her, or entitle her to a rectification, if she at the time understood and assented to the devolution of the after-acquired property as provided by the settlement, or made her father her agent to negotiate and arrange the terms of the settlement.

I see no case for a rectification, and think the appeal should be allowed.

Solicitors for Appellant: *Bolton, Robbins, Busk & Co.*
Solicitors for Respondent: *Bolton & Mote.*

W. W. K.

C. A.
1888
Jan. 19.

In re E. BULWER LYTTON'S WILL. KNEBWORTH SETTLED ESTATES.

[1887 L. 1781.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 26—*Permanent Improvement of Settled Property—Scheme—Approval—Extra Expenditure—Application of Capital Money in payment.*

In carrying out a scheme, which has been duly approved by the trustees, for improvements of permanent benefit to the settled estate, extra expenditure, not included in the contract forming part of the scheme submitted to the trustees, may be charged on capital moneys part of the settled estate in the hands of the trustees, where such extra expenditure is incidental to and has properly been incurred in a due execution of the scheme, and where the approval of the trustees has been general, and not limited to the particular amount mentioned in the contract.

APPEAL from the refusal by Mr. Justice *Stirling* in Chambers to allow payment out of capital moneys subject to the trusts of the settlement of the *Knebworth* estates, of certain expenses in excess of the original estimate, which had been incurred in carrying out a scheme, approved by the trustees, for the permanent improvement of the property, of which the Applicant, Lord *Lytton*, was tenant for life, by providing an additional water supply.

In 1882 a sale of a portion of the *Knebworth* settled estates as a site for a station on the *Great Northern Railway* was sanctioned by the Court with a view to rendering the adjoining portions of the property available for building purposes. The existing supply of water was, however, wholly inadequate, and in 1885 Lord *Lytton* instructed his surveyor, Mr. *Franklin*, to prepare a report which could be used as the basis of a scheme to be submitted to the trustees for their approval. *Franklin* accordingly drew up a report advising that by deepening an old well and pumping the water up to a tower recently added to *Knebworth House*, a practically inexhaustible supply of water would be obtained for the use of the mansion-house, and also for distribution over the area intended to be laid out as a building estate. Plans and a specification of the work to be done accompanied the report and were submitted for tender, and in May, 1885, a contract was entered into with *Spencer, Carter & Co.* for execution of the works mentioned in the specification at a cost of £993 13*s*.

A scheme, which referred to *Franklin's* report and the contract with *Spencer, Carter & Co.*, was submitted by Lord *Lytton* to the trustees for their approval, and to obtain their sanction to the application of so much of the capital moneys under their control as might be necessary for enabling them to adopt the contract already entered into. The trustees, by their solicitors, approved of the scheme in July, 1885, and nominated as their surveyor for the purposes thereof *Franklin*, whose appointment was duly approved by the Land Commissioners in August, 1885.

In carrying out the works comprised in the scheme it was found necessary to sink the well to a much greater depth than was at first contemplated, to increase the size of the engine-house, and to provide additional hydrants. The expense of the extra work, which, though not covered by the express terms of the original contract, had been certified to be absolutely necessary for satisfactorily and effectually carrying out the scheme, and as of permanent benefit to the estate, exceeded the original estimate by about £845. Of the original contract price of £993 the contractors had already received £850, and the question was whether the tenant for life was entitled to an order under sect. 26, sub-sect. 2, of the *Settled Land Act*, 1882, directing the trustees to pay the additional amount due (£990) out of capital moneys in their hands forming part of the settled estates.

Mr. Justice *Stirling* in Chambers, considering himself bound by *In re Hotchkin's Settled Estates* (1) had refused to make any order upon the summons taken out by Lord *Lytton*, and from such refusal the present appeal was brought. Of the £990 two sums amounting to £200 represented extra work relating to the water supply of *Knebworth House*, but any claim in respect of this £200 was withdrawn by Lord *Lytton*.

Cozens-Hardy, Q.C., and *P. B. Lambert*, in support of the appeal by Lord *Lytton*, the tenant for life:—

The additional expenditure in excess of the sum named in the original contract has been necessarily incurred, and is incidental to the proper execution of the scheme for improvements authorized by the *Settled Land Act*, 1882, s. 25 (xii.) (xiii.), and has been certified to be beneficial to the settled estate. The approval given by the trustees pursuant to the Act, sect. 26, sub-sect. 2, was to the scheme generally, and was not limited to the particular estimate, or made conditional upon the works being done for a certain price; and though the trustees before giving their approval are entitled to know what the expenditure will be, their functions are not limited to an approval of the particular estimate, and nothing more. We submit that the requirements of the Act (sect. 26) having been fully complied with, the tenant for life is entitled to an order authorizing the trustees to apply the capital money in their hands in payment of the work comprised in the improvements.

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(1) 35 Ch. D. 41.

In re Hotchkin's Settled Estates (1), by which Mr. Justice *Stirling* considered himself bound to refuse the application, does not apply, as in that case the work, although an improvement within the terms of the Act, was done without any scheme having been laid before the trustees for their approval, and the Court considered that, having regard to the requirements of sect. 26, it had no power to make the order.

Spencer Butler, for the trustees.

LORD HALSBURY, L.C.:—

In this case, no doubt, various difficulties may be suggested as to the meaning of the word "scheme" as used in sect. 26, and as to the limits within which the expenditure authorized is to be confined. It may have a meaning which, if narrowly insisted upon, would render the Act unworkable. On the other hand, when trustees have given their approval to a scheme which limits the expenditure to a certain amount, there may have been so wide a departure from the scheme as approved as practically to amount to the substitution of a new scheme for that which has been approved. It is impossible to lay down any general rule on the subject. Each case must be governed by its own particular

(1) 35 Ch. D. 41.

circumstances. Looking at the scheme submitted to the trustees, and to which they have given their approval, it is substantially a scheme for improving the value of the *Knebworth* estate by giving it the character of a building estate, and requiring the execution of works for obtaining and storing an increased supply of water. The scheme submitted to the trustees provided for getting water from a well and for storing the water so got in a tower, from which by gravitation it might be distributed over the portions of the estate intended for building purposes. I cannot but think that the trustees in giving their approval to the scheme were very probably misled as to the extent of the outlay that would be required; and expenses were incurred which at the outset, when the scheme was submitted to them, were not contemplated by them or by the tenant for life. Nevertheless the substantial feature of the plan, that certain works were to be executed, for which it was intended to charge the capital moneys in the hands of the trustees, was in accordance with the scheme which was originally submitted, and although the sum named in the original contract has been exceeded I am of opinion, striking out the items which have been abandoned, that the additional works fall substantially within the plan and that the order may be made.

COTTON, L.J.:—

I should add nothing if it were not a case of some importance under the Act, and one which for the first time raises the question. It is not at all like *In re Hotchkin's Settled Estates* (1), where the work was done without any scheme having been submitted either to the trustees or to the Court. The question we have to consider is whether the works which have been done, and in respect of which the additional expense not originally contemplated was incurred, are works which substantially fall within the terms of the scheme which was submitted to and approved by the trustees. It must be observed that their approval was not conditional upon the works being completed for the sum of £993 only, and in my opinion the additional expense (after deducting £200 in respect of items which have been abandoned) was incurred for works

(1) 35 Ch. D. 41.

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which were incidental to and necessary for the proper execution of the improvements which had been sanctioned by the trustees. The scheme, as stated by the Lord Chancellor, was for providing a sufficient supply of water by deepening one of the wells on the estate and raising the water to a tank and distributing it over the estate. In carrying out that scheme it was found that the contractors had spent more than was originally contemplated. It was found necessary not only to sink the well deeper than had been proposed, but also to provide for storing the water by making underground headings to increase the size of the tanks, and to do various other things which all fell within the proper execution of the scheme which had been approved, but which had not been mentioned either in the scheme or in the specification. Take the case of the extra expenses incurred in sinking the well to a greater depth. If there had been an approval by the trustees of this particular work, and if that further sinking was necessary in order effectually to carry out that work, then I think that it would come fairly within the proper execution of the scheme and plan which have been approved by the trustees. That being so, I think we may make the order for payment of the amount as reduced by excluding the items amounting to £200 which have been abandoned.

BOWEN, L.J. :—

I am of the same opinion. The inquiry which we have to entertain is what, in fact, is the scheme which was approved. Was the scheme which was laid before the trustees approved as a whole or in part only? That must require careful consideration in each case. It is obvious from sect. 26, sub-sect. 1, that the proposed expenditure to be incurred in the execution of the scheme forms a substantial part of every scheme which is to be laid before the Court or the trustees, and the approval to be given will be one which will have some reference to such proposed expenditure, without necessarily imposing a fixed limit as to expenses. A scheme may be approved generally, or subject to conditions as to expenditure. Probably if no limit were specified the trustees would be considered to have had a reasonable limit of expenditure in their minds. But it may be that the scheme may be general without any condition. Was there any condition imposed in this case on the approval of the scheme which, having regard to the end proposed, would exclude this extra expenditure? I think the broader view entertained by the Lord Chancellor and the Lord Justice is the better view, and that the scheme approved was a general one for supplying the estate with water, and that no condition was imposed.

Appeal allowed.

Solicitors: *Lambert, Petch, & Shakespear; Walker, Martineau & Co.*

F. G. A. W.

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Costs—Taxation—Refresher Fees to Counsel—Appeal from Chancery Division—Rules of Supreme Court, 1883, *Order* LXV., *r.* 27, *sub-rr.* 30, 37, 38, 48.

Where the hearing of an appeal from the Chancery Division occupies more than one day, the Taxing Master has a discretion to allow additional fees to counsel, in the shape of a daily allowance or otherwise, though no *vivâ voce* evidence has been adduced before the Court of Appeal, such fees not being treated as refreshers in the sense in which refreshers are dealt with on taxation as fixed sums, but as an allowance by way of addition to the original fees, on the ground that such fees have by miscalculation been fixed too low. This discretion, however, is to be exercised with jealousy, since there is not in such a case the same difficulty in fixing the proper fee at first as there is in cases where oral evidence is adduced, the probability of a case lasting long in argument being a matter which ought to be taken into account at the time of delivering the brief.

Order of *North*, J., affirmed.

Svendsen v. *Wallace* (1) explained.

SUMMONS by one of the Defendants to review a taxation of costs. The question was whether refresher fees to counsel could be allowed in respect of the hearing of an appeal from a judgment of a Judge of the Chancery Division of the High Court.

The appeal in the present case was by the Plaintiffs from a decision of Mr. Justice *Pearson.* It came on for hearing on the 29th of October, 1886. The hearing occupied four days, the

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(1) 16 Q. B. D. 27, 29, 30.

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29th and 30th of October, and the 1st and 2nd of November. Judgment was reserved, and on the 12th of November, 1886, the Court dismissed the appeal, with costs to be paid by the Plaintiffs (1). On taxing the costs of the first Defendants, the *London Joint Stock Bank*, the Taxing Master disallowed refresher fees, which had been paid to their counsel for the last three days of the hearing of the appeal. The Defendants carried in objections to this disallowance, stating the following reasons: "It has been the practice in proper cases to allow refreshers to counsel in the Court of Appeal, and this practice is sanctioned by Order LXV., r. 27 (30), and by the judgments delivered in *Svendsen* v. *Wallace* (2)."

To these objections the Taxing Master replied as follows: "The case of *Svendsen* v. *Wallace* does not apply to appeals in the Chancery Division. In the Court of Chancery, before the oral examination of witnesses in the Court, daily refreshers were not allowed nor paid. In *Harrison* v. *Wearing* (3) the decision and reasoning of *Jessel*, M.R., are quite opposed to the allowance of daily refreshers on appeals."

The summons was heard before Mr. Justice *North* on the 25th of October, 1887.

W. D. Rawlins, for the summons:—

Under the Rules of the Supreme Court, 1883, it is intended that the practice as to costs should be the same in all the Divisions of the High Court, and with regard to appeals from whatever Division they come, unless it is expressly provided to the contrary: Order LXV., rule 27, sub-rules 30, 37, 38, 48 (4).

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(1) 34 Ch. D. 95.

(2) 16 Q. B. D. 27, 29, 30.

(3) 11 Ch. D. 206.

(4) Rule 27 of Order LXV. provides by sub-rule 48 for the allowance of refresher fees "when any cause or matter is to be tried or heard upon *vivâ voce* evidence in open Court, if the trial shall extend over more than one day," but there is no express provision for allowing refreshers on the hearing of an appeal.

Sub-rule 30: "As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed."

Sub-rule 37: "The rules, orders, and practice of any Court whose jurisdiction is transferred to the High Court of Justice or Court of Appeal, relating to costs, and the allowance of the fees

The practice of the old Common Law Courts as to the allowance of refresher fees on trials of actions with oral evidence was adopted in the Court of Chancery after oral evidence was introduced there, and is now adopted in the Chancery Division: *Harrison* v. *Wearing* (1); *Brown* v. *Sewell* (2).

Formerly refresher fees were allowed on the hearing of appeals from the Courts of Common Law to the Exchequer Chamber, and in *Svendsen* v. *Wallace* (3) it was held by a Divisional Court that, under the Rules of the Supreme Court, 1883, such fees may be allowed on the hearing of an appeal from the Queen's Bench Division. There is but one Court of Appeal, and that decision governs the present case.

[He was stopped by the Court.]

Grosvenor Woods, for the Plaintiffs:—

The *ratio decidendi* of *Svendsen* v. *Wallace* was that the old common law practice remained in force. The Court founded their decision on sub-rule 30. Their attention was not called to sub-rule 37. They did not profess to be dealing with or altering the old practice as to Chancery Appeals. On such appeals refresher fees had not been "heretofore allowed" within the meaning of sub-rule 30. Sub-rule 37 preserves the old practice with regard to appeals from each Division. *Harrison* v. *Wearing*

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of solicitors and attorneys, and the taxation of costs, existing prior to the commencement of the principal Act, shall, in so far as they are not inconsistent with the principal Act and these Rules, remain in force and be applicable to costs of the same or analogous proceedings, and to the allowance of the fees of solicitors of the Supreme Court and the taxation of costs in the High Court of Justice and Court of Appeal."

Sub-sect. 38: "As to all fees or allowances which are discretionary, the same are, unless otherwise provided, to be allowed at the discretion of the taxing officer, who, in the exercise of such discretion, is to take into consideration the other fees and allowances to the solicitor and counsel, if any, in respect of the work to which any such allowance applies, the nature and importance of the cause or matter, the amount involved, the interest of the parties, the fund or persons to bear the costs, the general conduct and costs of the proceedings, and all other circumstances; and where a party is entitled to sign judgment for his costs, the taxing officer, in taxing the costs, may allow a fixed sum for the costs of the judgment."

(1) 11 Ch. D. 206.

(2) 16 Ch. D. 517.

(3) 16 Q. B. D. 27.

dealt only with refreshers at the trial of an action in a Court of first instance. *Jessel*, M.R., then pointed out that the reason for allowing refresher fees on a trial was that, when evidence was to be given *vivâ voce*, it was impossible for the solicitor to tell beforehand how long the trial was likely to last, and therefore he could not judge what was the proper fee to mark on the brief of counsel. That reason does not apply to the hearing of an appeal, where the evidence already taken is in writing. The materials are known to the solicitor when he prepares the brief, and he is in a position to mark a fee which will cover everything. It would not be right that the amount of the fee should depend on the length of the arguments; that would be an encouragement to long arguments. If the practice is to be uniform with regard to all appeals, the old Chancery practice ought to be adopted. *Edgington* v. *Fitzmaurice* (1) shews that in the opinion of Mr. Justice *Pearson* refresher fees could not be allowed on the hearing of an appeal.

NORTH, J.:—

The Court of Appeal is one Court, entertaining appeals from the Chancery Division of the High Court, the Queen's Bench Division, the Probate Division, the Bankruptcy Court, the Palatine Court of *Lancaster*, and other jurisdictions. In almost all cases the appeals are heard without *vivâ voce* evidence. It seems to me that it would be very inconvenient if the costs of an appeal were to be regulated, not by the amount of the work done, but by the circumstance from which Court the appeal happened to be brought, though the work done in the Court of Appeal in respect of appeals brought from different Courts might be of precisely the same character. The Rules of 1883 appear to me to be a code regulating the practice in the High Court and the Court of Appeal generally. *Svendsen* v. *Wallace* (2) was an important mercantile case, which was carried to the House of Lords, and no doubt the question of the refreshers to be allowed in it was a serious matter. In that case, as in the present case, the Taxing Master had held that he ought to disallow the refreshers altogether. Mr. Justice *A. L. Smith* said that he understood that the

(1) W. N. 1885, p. 170; 33 W. R. 913.

(2) 16 Q. B. D. 27.

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Master had exercised no discretion, but had decided as a matter of law that no refreshers could be allowed in any case on an argument in the Court of Appeal. In the same way in the present case I understand that the Taxing Master has exercised no discretion, but has held that refreshers cannot be allowed on the argument of any appeal from the Chancery Division. He has drawn a line which, in my opinion, cannot be maintained. I think the rule ought to be the same from whatever Court the appeal may come. The governing principle is, that the procedure in all branches of the Court should be the same, and this has been recognised in other cases. When different practices formerly existed in the Court of Chancery and the Courts of Common Law, the Court of Appeal has held that, now that the Courts are all united, the more convenient of the two practices should be followed. The case of *Svendsen* v. *Wallace* (1), which laid down the practice with regard to appeals from the Queen's Bench Division, was decided three years ago, and I think it is more convenient that it should be followed with regard to appeals from the Chancery Division. I do not regard the rules as making distinction between the different Divisions of the Court. [His Lordship referred to sub-rules 30 and 48 of rule 27.] I should feel myself bound to follow the decision in *Svendsen* v. *Wallace*, even if I did not think it was right. I am not now deciding whether refreshers ought to be allowed in the present case; I only decide that the Taxing Master has power to allow them, if he thinks fit to do so. It is a matter for his discretion. I refer the case back to him, with an expression of my opinion that he has power to allow refreshers. The costs of the summons must follow the event.

W. L. C.

The material part of the order as drawn up was: "This Court, being of opinion that the Taxing Master may, if he thinks fit, allow refreshers, doth order that it be referred back to the Taxing Master to vary his certificate accordingly."

The Plaintiffs appealed, and the appeal was opened on the 21st of December, 1887.

(1) 16 Q. B. D. 27.

Grosvenor Woods, for the Appellants :—

The principle as to daily refreshers is enunciated in *Harrison* v. *Wearing* (1). They were allowed on account of the impossibility of duly estimating the proper amount of fee in witness cases before the cause came on for trial. That case shews what the practice was before the Rules of 1883. I contend that Order LXV., rule 27, sub-rule 48, defines the only case in which daily refresher fees can be allowed. Our case relates only to refreshers on the appeal, no question arises as to those on the hearing below, and the case comes within sub-rule 37, which preserves the Chancery practice. Mr. Justice *North* thought himself bound by *Svendsen* v. *Wallace* (2); but in that case the Court went on sub-rule 30, and held that the Common Law practice was still in force. That does not import that practice into appeals from the Chancery Division. I submit that sub-rule 30 does not apply, inasmuch as there is an express rule (sub-rule 48) as to refreshers.

COTTON, L.J. :—

Having regard to sub-rule 37 we think we ought to know what the practice was as to refreshers in appeals to the Exchequer Chamber and in appeals to the Court of Appeal in Chancery before the *Judicature Acts*. The appeal will stand over for the Registrar to make inquiry into the practice.

FRY, L.J., concurred.

The Registrar accordingly requested the Taxing Master to inform the Court—

"What was the practice with regard to refresher fees in witness causes and also in non-witness causes in the Court of Exchequer Chamber, and also in the Court of Appeal in Chancery, before 1875, when the *Judicature Acts* came into operation, and also between 1875 and 1883 when the new Orders came into operation?"

The Taxing Master replied as follows :—

"In the earnest desire of affording your Lordships reliable information I have conferred with my colleagues in the Chancery

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(1) 11 Ch. D. 206.

(2) 16 Q. B. D. 27.

Division, and also with Master *Johnson* in the Queen's Bench Division. The latter Master has very considerably assisted me with reference to the Exchequer Chamber practice.

"With your Lordships' permission I will first deal with the Court of Appeal in Chancery.

"The practice in the Court of Appeal in Chancery before 1875 in non-witness causes was uniform *not* to allow daily refresher fees, the only refresher fee recognised being the usual sittings fee of £2 4*s.* 6*d.* to the leader and £1 3*s.* 6*d.* to the junior. Although it was not the practice to allow daily refresher fees, the Chancery Taxing Masters accorded in allowing what, in their discretion, were proper fees for the services rendered, and where the fee given on the brief when delivered was in the Master's judgment insufficient, they uniformly allowed an additional or further fee, but such additional or further fee was not in the smallest degree recognised by the Masters as a daily refresher, but was considered by them purely and simply as part and parcel of the proper fee on the hearing of the appeal.

"The propriety of the practice of the Chancery Masters of adding to the original fee, in contradistinction to recognising the allowance of daily refreshers, is illustrated in and countenanced by *Edgington* v. *Fitzmaurice* (1). I have not forgotten *Smith* v. *Buller* (2) (decided by *Malins*, V.C.), which was, no doubt, for a short time authority for the allowance of daily refreshers in non-witness actions. *Harrison* v. *Wearing* (3), which soon followed, dissented from it, and the latter case, being in accordance with the practice in the offices of the Chancery Masters, has been followed by them.

"Before 1875 there were in the Court of Appeal in Chancery, or in fact in the Chancery Courts of first instance, very few witness actions. Occasionally there might be one (an issue or patent cause), but they were few and far between, and afforded little opportunity of establishing the practice on the subject; but, so far as I have been able to learn, daily refreshers were in such cases (that is where witnesses were examined) allowed both in the Court of first instance and in the Court of Appeal.

(1) 29 Sol. J. 650.

(2) Law Rep. 19 Eq. 473.

(3) 11 Ch. D. 206.

"Between 1875 and 1883 non-witness causes were dealt with in exactly the same way as they were dealt with previously to 1875, but witness actions between those years were considered in the light of *nisi prius* actions, and daily refreshers were recognised and allowed.

"As to the practice in the Exchequer Chamber:—

"The practice here seems to have been much the same as the practice in the Chancery Division, viz., where it was in the judgment of the Master proper to do so, he allowed such further or additional fee, either daily or otherwise, as in his discretion was, with the fee marked on the brief, a proper fee for the services rendered.

"I observe that in the case of *Svendsen* v. *Wallace* (1) Mr. Justice *Smith*, in his judgment, states 'that before these rules came into force it is conceded that refreshers were allowable upon the argument of special cases and otherwise in the Exchequer Chamber and afterwards in the Court of Appeal.'

"Excepting as I have stated above I am not aware of the authority for this. So far as I can learn, refreshers or further fees were always in the discretion of the Master (*Turnbull* v. *Janson* (2)), and were never recognised as 'daily refreshers,' but were regarded as further or additional fees."

On the 25th of January, 1888, the appeal came on again before Lords Justices *Cotton* and *Bowen*.

Grosvenor Woods, for the appeal:—

If the Court is against me on the point that the case is settled by sub-rule 48, the case, I contend, is within sub-rule 37, and it has to be considered what was the practice before the new rules.

[COTTON, L.J., here read the certificate of the Taxing Master in answer to the question proposed to him.]

The Taxing Master here went upon that principle, he considered that he had power to allow an extra fee on the brief, and he did in some cases allow a further fee. What he objected to was the allowance of daily refreshers.

(1) 16 Q. B. D. 30.

(2) 3 C. P. D. 264.

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[COTTON, L.J.:—I think that some confusion has arisen from the use of the word "refresher." It appears that the Taxing Master had power to allow a further fee.]

We do not dispute that.

[COTTON, L.J.:—Mr. Justice *North* did not decide that the refreshers must be allowed. He only referred it back to the Taxing Master to consider whether some allowance should not be made by way of refresher.]

We should not have objected to the order if it had expressed that, but the Taxing Master has interpreted the order as meaning that he has power to allow daily refreshers, and he has accordingly allowed them all. This, I submit, was the true construction of Mr. Justice *North's* order. *Edgington* v. *Fitzmaurice* (1) shews the opinion of Mr. Justice *Pearson* to have been in favour of our view that daily refreshers cannot be allowed.

Rawlins, for the Respondents, having stated, in answer to a question from the Court, that he did not contend that daily refreshers should be allowed as fixed sums, was not further called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North,* the effect of which seems to have been misunderstood, as has also the decision of the Queen's Bench Division in the case of *Svendsen* v. *Wallace* (2). It seems to have been considered that Mr. Justice *North* directed the Taxing Master to deal with the daily refreshers as fixed sums, but the order as actually drawn up did nothing of the kind. Daily refreshers were introduced into the Chancery Division when it became the practice to try actions with *vivâ voce* evidence or with cross-examination of witnesses who had made affidavits, and refreshers were allowed on the principle that it could not be estimated beforehand by the solicitors delivering the brief how long the examination of the witnesses on either side would occupy, and it was therefore desirable that the same fees should be allowed as were allowed in similar cases at common law. But this principle does not generally apply to hearings in

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(1) 33 W. R. 913.

(2) 16 Q. B. D. 27.

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the Court of Appeal, because, as a general rule, there is no oral evidence before the Court of Appeal. I do not say that there cannot be, because when evidence has not been heard before the Court below, which the Court thinks ought to be heard, we allow it to be given here. In such cases the ordinary rule as to witness cases or cases with cross-examination of witnesses would of course apply. But in the present case there was an appeal without any *vivâ voce* evidence, and the question is, ought the Master to be allowed to make any addition to the fees marked on the briefs of counsel before the appeal began? A good deal of confusion has been occasioned by the use of the word "refresher." "Daily refresher" is a well-known term as an allowance or an addition day by day of a certain sum, which is fixed, as a rule, both as regards the senior counsel and as regards the junior counsel. That refreshers are not confined to witness actions is shewn by this, that in the House of Lords, and I think also in the Privy Council, where a case takes more than a certain time refreshers are allowed on taxation as fixed sums. But what has been the practice in the Court of Appeal? As far as I understand, both in the Court of Appeal in Chancery and before the Exchequer Chamber, it has been the practice not to allow daily refreshers of a fixed amount, but if the Taxing Master in either Division is satisfied that the fee originally marked on the brief of counsel is not sufficient, then he allows an addition to be made to it, and allows it in taxation as against the opponent, and, of course, also as between the solicitor and his own client who has instructed him. Where there are no witnesses, it is the duty of the solicitor, as far as possible, to form an opinion, before the case begins, what, having regard to the importance of the case and the probable length of the argument, will be the proper fee to mark on the brief of counsel, and the Taxing Master, unless satisfied that there has been some mistake made, would not allow any addition to be made afterwards to that fee. In my opinion, interpreting the order of Mr. Justice *North* rightly, it merely follows out what was the old practice, both here and in the Exchequer Chamber, of allowing the Master to exercise his discretion when he considers that the fee originally marked on the brief of counsel has not been sufficient, and nothing more than that was decided in *Svendsen* v. *Wallace* (1). The Judges did not there say that daily refreshers were to be allowed, but only that the Master has a discretion as to allowing what they called "refreshers," which is, perhaps, an unfortunate term. If we may criticise in any way the language used by our brethren in the Common Law Division they had better have said that the Taxing Master had a discretion to allow an addition to the fees marked originally on the brief of counsel. That was not allowing daily refreshers in the sense in which daily refreshers are dealt with in taxation. That case was decided with respect to Order LXV., rule 27, sub-rule 30, which is, "As to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work and labour as have heretofore been allowed." All that was decided was this: "We think the Master is not bound to disregard any suggested addition to the fees of counsel. He must take the matter into consideration, and, as in the Exchequer Chamber and in the Court of Appeal in Chancery, he has a discretion to consider whether the original fee marked was from an accidental circumstance or otherwise insufficient, and if he finds it to be so he may allow an addition." That was called a refresher, but really it was not a refresher in the sense in which that word is used in speaking of a daily refresher in witness cases. In my opinion all that Mr. Justice *North* intended to decide in the present case was this, that the Master, not allowing daily refreshers as fixed and definite sums, was at liberty to consider whether, having regard to the time occupied, in his discretion it would be right to make any addition to the fees marked on the briefs of counsel. I think that is right, and the case ought to go back to the Master with that expression of our opinion. The appeal therefore fails.

BOWEN, L.J.:—

I am of the same opinion. It seems to me that, putting aside the House of Lords' practice, and the Privy Council practice and the Parliamentary practice, there is, as regards the fees in the High Court and in the Supreme Court, a broad principle

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(1) 16 Q. B. D. 27.

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which lies at the root of the whole matter, viz., that a solicitor must make up his mind at the time he delivers his brief what he intends the counsel to receive with the brief, and the fee ought to be marked then. But there is a class of business where it is extremely difficult for a solicitor to judge within any reasonable limits how long a case is likely to last. In a witness case it is impossible, by looking at the brief beforehand, to tell how long it will last, and therefore, in fixing the fee in a witness case, the solicitor is assumed to have supposed, when he fixed it, that if the case is prolonged daily refreshers will be allowed on the ground that this prolongation has not been taken into consideration in the amount originally fixed for the fee. This reason applies to witness cases in the Courts of first instance, and also, as I apprehend, to witness cases here, for, as the Lord Justice has pointed out, we do sometimes hear witnesses. But in other cases, where there is only an argument on law, or an argument addressed to the judge on inferences to be drawn of mixed law and fact, the solicitor makes up his mind beforehand what amount of fee will represent the entire attention that the case requires from the counsel. It does not follow because a case is a very heavy case that therefore refreshers ought necessarily to be allowed, for the fact that the case is a heavy one, and may, therefore, probably take in argument more than one day, or more than two or three days, is a fact which the solicitor ought to weigh in marking the original fee upon the brief when the case is not a witness case. Unfortunately misconception arises by the frequent application of the term "refresher" where it ought not to be applied. When a solicitor comes before the Master on an application to allow refreshers in non-witness cases, on the ground that the case has been a heavy one, or the argument prolonged, he is wrong in putting his application in the shape of a demand for the allowance of refreshers. The only ground on which, in such a case, the fee ought to be increased by the Master, is the ground that there has been a miscalculation by the solicitor at the inception of the trial when the fee was marked, and that he under-marked the fee. Now in such a case, if there has been a clear miscalculation, it appears to me that it would be monstrously unjust not to allow it to be corrected, but the Master, on the other hand, would be perfectly right in being extremely jealous and extremely unwilling to accede to the application without clear proof that there has been a miscalculation, because it is the business of the solicitor when he marks the fee, and the business of the barrister's clerk when he receives the fee, or when he acquiesces in the fee, not to miscalculate, but to calculate aright, and therefore, if afterwards they come to say that the fee has been miscalculated they ought to make it out.

I think it unfortunate that in this case Mr. Justice *North*, though he has made the right order, has used the term "refresher," which may again lead to difficulty unless we put it right. We send this case back to the Master to consider whether the fees should be increased on the ground that there has been some miscarriage or miscalculation at the time they were originally fixed, and that the miscalculation had been shewn by something having happened since which was not taken into account at the time it was fixed, namely, by the case having lasted longer than might reasonably have been expected. The test the Master has to apply in considering that question, is not simply the fact that the case has been a heavy one. Many cases come into the Court of Appeal for argument which are heavy cases, cases in which we hear counsel of the greatest distinction on points of law, which, speaking for myself, I find it extremely difficult to decide. A case of that description is not a case which you can be certain will be finished in a day or, perhaps, two days, and therefore the solicitor, when he fixes the fees, ought to take into consideration the heaviness of the case and the possibility that it may go over several days. It therefore does not follow that because it takes several days the Taxing Master ought to add to the fees. He must look at the whole thing, and see whether the proper fees have been marked, and if he thinks there has been a miscarriage by reason of any miscalculation at the time when the fees were marked he ought to correct it. That is all he ought to do. The use of the term "refresher" as applied to such a case seems to me to be unfortunate.

I may add that I do not think we are deciding anything contrary to *Svendsen* v. *Wallace* (1), but are deciding in the same

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(1) 16 Q. B. D. 27.

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way. The only objection that I take to that case is on the use of the term "refreshers," which has caused a misunderstanding, and if the case is read carefully it in no way conflicts with what we have said. I should also like to add that nothing I have said, and I think nothing the Lord Justice has said, at all prevents the Master, when the matter goes back to him, from making an addition to the fees in the shape of a daily allowance, if he thinks that there has been a miscarriage in the original calculation, and that a daily allowance would be the fairest way of setting it right.

Solicitors for Defendants: *Clarke, Rawlins, & Co.*
Solicitors for Plaintiffs: *West, King, Adams, & Co.*

H. C. J.

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Feb. 1.

GAULARD *v.* LINDSAY.

[1887. G. 495.]

Patent—Disclaimer pending Action for Infringement—Terms of giving Leave to amend by Disclaimer—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 19.

Pending an action for infringement of several patents, leave was given to the Plaintiffs to apply at the Patent Office to amend one of the specifications by way of disclaimer, and to give the amended specification in evidence at the trial, on the terms of the Plaintiffs paying all the costs of the action up to the time of leave being given, and waiving all claim to recover damages for infringements prior to the amendment.

THIS was an action commenced on the 11th of March, 1887, for infringement of five patents vested in the Plaintiffs, one of which was granted in 1882 for a method of generating electric currents by means of secondary generators, and the others in 1884 and 1885. The Defendants by their defence denied the fact of infringement, and disputed the validity of the patents. Notice of trial was given on the 12th of May, 1887.

Previous to the commencement of this action *Ferranti,* to whom two patents, which the Defendants were working, had been granted, presented on the 11th of December, 1886, a petition for revocation of the Plaintiffs' patent of 1882 and of one of the Plaintiffs' other patents. The patent of 1882 was the one of the greatest importance to the Plaintiffs, the others being only for subsidiary parts of the apparatus they used. The petition was repeatedly ordered to stand over, and ultimately, the 23rd of November, 1887, was fixed for hearing it. In the meantime the Respondents (the Plaintiffs in the present action) were advised that the principal patent was open to objection and that the specification required amendment. They accordingly moved in the matter of the petition for leave to amend the specification of the patent of 1882 by way of disclaimer, correction, or explanation; and on the 21st of November Mr. Justice *Kekewich* made an order "that the Applicants be at liberty forthwith to apply to amend the specification filed in pursuance of the letters patent No. 4362 of 1882 by way of disclaimer, the Applicants undertaking to prosecute their proceedings with all diligence; and that the Petitioner be at liberty within fourteen days after notice of the amendments made in the said specification either to amend his petition and the particulars of objections delivered by him, or to discontinue all proceedings thereunder."

On the 29th of November the Plaintiffs gave notice of motion in the action for liberty to apply at the Patent Office to amend the specification of 1882 by way of disclaimer, correction, or explanation, and that in the meantime the hearing of the action might be postponed, and that the amended specification might be used at the trial of the action upon such terms as might seem fit to the Court. Mr. Justice *Kay,* to whose Court the action was attached, postponed the application, saying that the two proceedings ought to be before the same Court. The action was accordingly transferred to Mr. Justice *Kekewich,* and a similar notice of motion was given before him. The Defendants offered to allow the Plaintiffs to discontinue their action as to the patent of 1882, they paying the costs as to that part of the case, but this offer was declined. Mr. Justice *Kekewich* considered that the hearing as to the other patents ought not to be postponed, and that, as the Plaintiffs had refused the offer made to them, the application must be refused.

The Plaintiffs appealed, and the appeal was heard on the 1st of February, 1888.

Aston, Q.C., and *J. C. Graham*, for the Appellants:—

If leave to amend a patent where an action is pending is to be given at all, it cannot be right to give it only on terms which make it a nullity. *Haslam Foundry and Engineering Company* v. *Goodfellow* (1) lays down the reasonable rule where the action has proceeded to a considerable length, that case being there distinguished from one where the action is only just commenced, as in *Fusee Vesta Company* v. *Bryant & May* (2).

[COTTON, L.J.:—How do you distinguish this case from *Bray* v. *Gardner* (3)?]

That case does not lay down any hard and fast line—every case must be determined according to its own circumstances: *Allen* v. *Doulton & Co.* (4). Sect. 19 of the Act was evidently intended to give some relief to a patentee, and it manifestly contemplates that the amended specification should in some cases be given in evidence, otherwise it would not have said anything about postponing the trial. If the amended specification cannot be given in evidence the costs incurred by the patentees will be wholly thrown away—and without any advantage to the Defendants, for they will have a fresh action brought against them.

[COTTON, L.J.:—Are you willing to take leave to amend and to give the amended specification in evidence, upon the terms of your paying the costs of the action up to the present time, and claiming no damages for any infringements before the amendment?]

The Plaintiffs are willing to accept those terms, though they will lose their chance of obtaining damages for infringements before the amendment under sect. 20.

Moulton, Q.C., and *Pyke*, appeared for the Defendants, and stated that the Defendants did not object to an order of that nature.

COTTON, L.J.:—

As the parties assent to the order we propose, I shall give judgment very briefly. In *Bray* v. *Gardner* Mr. Justice *Stirling* had given leave to a plaintiff in an action for infringement to apply at the Patent Office to amend his specification upon the condition that the amended specification should not be given in evidence in the action. We said that liberty to apply to amend ought not to be given without seeing that no injustice was done to the Defendant, and that as a general rule the terms imposed by Mr. Justice *Stirling* were proper. Mr. Justice *Kekewich* thought that in the present case right would be done by allowing the Plaintiffs to discontinue their action as to the patent which they asked leave to amend. It is, however, undesirable that the action should go on merely as to the other patents which are subsidiary to the principal one, and we think that complete justice will be done if the Plaintiffs are allowed liberty to apply for leave to amend, and to give the amended patent in evidence, they paying all the costs of the action up to the present time and not claiming damages for any infringement prior to the amendment. The expense of entirely fresh proceedings will thus be saved to the Plaintiffs, and no wrong can be done to the Defendants. Liberty will be given to amend the pleadings and to deliver fresh particulars of objection.

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(1) 37 Ch. D. 118.
(2) 34 Ch. D. 458.
(3) 34 Ch. D. 668.
(4) 4 Rep. Pat. Cas. 377.

LINDLEY, L.J. :—

Bray v. *Gardner* (1) and *Allen* v. *Doulton & Co.* (2) do not conflict with each other. The Court must in each case that comes before it see what conditions will do justice between the parties. Our order differs very little in substance from the decision of Mr. Justice *Kekewich*, though it is somewhat more favourable to the Plaintiffs.

BOWEN, L.J. :—

What has been said by Lord Justice *Cotton* does not at all narrow the Act. We have often said that where an Act gives a discretion we are unwilling to lay down rules as to how it should be exercised. Here the Act expressly says that leave may be given subject to such terms as the Court or a Judge may impose.

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(1) 34 Ch. D. 668.

(2) 4 Rep. Pat. Cas. 377.

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The terms, then, are to be such as in the opinion of the Court will prevent any injustice being done.

Solicitors for Plaintiffs: *Campbell, Reeves, & Hooper.*
Solicitor for Defendants: *A. C. Curtis-Hayward.*

H. C. J.

C. A.
1888
Jan. 31; *Feb.* 3.

In re WHEAL BULLER CONSOLS.

Company—Winding-up—Contributory—Director—Qualification of Director.

By the articles of association of a limited company it was provided that the qualification of a director should be the holding 250 shares at least, that he might act before acquiring his qualification, but that his office should be vacated if he did not acquire it within three months after his election.

J., who had subscribed the memorandum of association for ten shares, was elected a director, accepted the office, and attended meetings of directors for more than three months from his election, but never applied for, nor had allotted to him, any other shares than his original ten. In the winding-up of the company the Vice-Warden of the Stannaries held that *J.* must be on the list of contributories for 250 shares:—

Held, on appeal, that the acceptance of the office of director and the continuing to act after the time by which the qualification ought to have been acquired, did not amount to a contract by *J.* to take the additional shares requisite for his qualification, and that he must be upon the list for ten shares only.

THE *Wheal Buller Consols* was incorporated as a limited company in February, 1883, for mining purposes, with a nominal capital of £100,000 divided into preference shares and ordinary shares of £1 each. The Appellant *Jobling* subscribed the memorandum of association for ten shares.

It was the intention of the promoters that the company should purchase the undertaking of the *Basset and Buller Mining Company*, though this undertaking was not specifically referred to in the memorandum or articles.

By the articles of association five directors were appointed, of whom *Jobling* was not one. Power was given to the directors at any time before the annual general meeting in 1884 to appoint other directors. The articles contained the following clauses:—

"89. The qualification of a director shall be the holding of preference shares or stock of the company of the nominal value of £250 at the least. Any director may act before acquiring his qualification shares or stock."

"91. The office of director shall be vacated:—

"(*a.*) . . . .

"(*d.*) If he cease to hold his qualification shares, or do not acquire the same within three months after election or appointment."

By clause 102, the directors were authorized to appoint one of their number to be managing director, and clause 104 provided for his remuneration.

The first meeting of directors was held on the 23rd of February, 1883, and at this meeting Mr. *Makepeace* was appointed secretary. The next meeting was held on the 10th of May, 1883. Mr. *Jobling* was present and was elected a director in place of one who had resigned. The question of appointing a managing director was raised but was postponed. The last meeting of directors was held on the 27th of June, 1884. Various meetings of directors were held in the interval, at five of which *Jobling* was present. Only two of these five meetings, the 23rd of November, 1883 and the 28th of December, 1883, took place after the expiration of three months from *Jobling's* election. At the time of the last of these meetings which Mr. *Jobling* attended the mine was in the hands of the sheriff and there was no reasonable prospect of being able to carry on the undertaking.

Only 2815 shares were allotted, and the company became abortive. A petition to wind it up was presented on the 19th of January, 1884, and an order for winding-up was made, but was not drawn up till August, 1885.

In the ledger of the company, which was the only book in which allotments were recorded, was an entry in the handwriting of Mr. *Makepeace* treating Mr. *Jobling* as holder of 250 shares. Against it was the following entry, also in the handwriting of Mr. *Makepeace:* "The above entry was made in error. Mr. *Jobling* was not one of the original directors of the *Wheal Buller*, and never agreed to take 250 shares therein. It was intended had the arrangement to purchase the interest of the *Basset and Buller* been carried out that Mr. *Jobling* should be the managing director of the company, and against his salary and fees he was to take 250 shares in the *Wheal Buller Company*.

(Signed) "*R. Makepeace*, Sec^{y}."

The Registrar of the Stannaries Court, acting as liquidator, claimed to have *Jobling* put on the list of contributories for 250 shares.

Jobling, by affidavit, deposed that he never agreed to take 250 shares; that it was intended that the company should purchase the interest of the *Basset and Buller Company*, and that if that was done he should be made managing director, and that in that event it would have been necessary for him to qualify for a director by increasing his holding to 250 shares; but that the arrangement was never carried out and he never therefore agreed to take more than the original ten shares; that he knew nothing of the entry in the ledger that he was holder of 250 shares till he was informed thereof on the 16th of May, 1887.

Mr. *Jobling* was not cross-examined.

Mr. *Makepeace* made an affidavit to the same effect as his note in the ledger. He was cross-examined, and could not give any information as to the date of his corrections in the ledger, but adhered to the statement that it was a correction of a mistake which he had unquestionably made. He was not asked any questions as to when the original entry was made.

The Vice-Warden of the Stannaries on the 29th of August, 1887, held that under these circumstances the case was not brought within *Miller's Case* (1); *Leeke's Case* (2) and other cases referred to in *Brett's Case* (3), where a director was held liable for shares entered in his name in the books of the company though never formally allotted to him, and though he did not actually know of the entry. His Honour accordingly held that the determination of the case must turn upon the question whether a director who acted, as under the articles of association he was entitled to act, before qualifying himself, but who had a reasonable time and ample facilities for qualifying himself and failed to do so, ought to be placed upon the list of contributories for the requisite number of shares. His Honour considered that the

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(1) 3 Ch. D. 661.

(2) Law Rep. 6 Ch. 469.

(3) 25 Ch. D. 283, 295.

Marquis of Abercorn's Case (1), *Brown's Case* (2), and *Levita's Case* (3) only decided that the acceptance of the office of director would not alone make the director liable for the amount of qualifying shares, and that in *Brett's Case* (4) the point whether acceptance of the office and acting would not make him liable was left open. His Honour thought that the observations of the late Master of the Rolls in *Karuth's Case* (5), *Hamley's Case* (6), and *Miller's Case* (7) warranted the conclusion that acceptance of the office and acting after the time when it was required that the director should have the qualification, amounted to a contract to take the requisite number of shares, and that Mr. *Jobling* must therefore be placed on the list for 250 shares.

Mr. *Jobling* appealed so far as related to 240 shares, and the appeal was heard on the 31st of January and the 3rd of February, 1888.

Grosvenor Woods, for the Appellant:—

There was no agreement to take shares that could be enforced against the Appellant. The mere acceptance of the office of director is no contract to take shares: *Brett's Case; Brown's Case; Re Pandora Theatre Company* (8); *Onslow's Case* (9). It is necessary to find a contract with the company to take shares. Now the articles only constitute a contract between the shareholders *inter se,* and a contract with the company cannot be made out of them: *Browne* v. *La Trinidad* (10). What was the contract entered into? Not a contract to qualify themselves: *Coventry and Dixon's Case* (11). By sect. 23 of the *Companies Act,* 1862, a person in order to be a member must have taken shares or agreed to take them, *i.e.*, agreed with the company to take them. Now nothing in the articles constitutes an agreement with the company: *Pritchard's Case* (12); *Carling's Case* (13); *Chapman's*

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(1) 4 D. F. & J. 78.
(2) Law Rep. 9 Ch. 102.
(3) Ibid. 3 Ch. 36.
(4) 25 Ch. D. 283.
(5) Law Rep. 20 Eq. 506, 511.
(6) 5 Ch. D. 705.
(7) 3 Ch. D. 665.
(8) 28 Sol. J. 238.
(9) 55 L. T. (N.S.) 612; 31 Sol. J. 46; 3 Times L. R. 42; S. C. on appeal, 3 Times L. R. 551; W. N. 1887, p. 79.
(10) 37 Ch. D. 1.
(11) 14 Ch. D. 660.
(12) Law Rep. 8 Ch. 956.
(13) 1 Ch. D. 115, 122, 124.

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Case (1). But suppose the articles do constitute an agreement by the members with the company, what is the agreement? An agreement to conform to the articles, not an agreement to qualify. The articles contain no regulation that a director shall take shares, but only that he shall vacate his office if he does not. If he does not he incurs liability by acting without authority, but that is all. The observations relied on by the Vice-Warden in *Karuth's Case* (2) and *Miller's Case* (3), were only *dicta*, and they have never been carried out by any decisions. Considering the entry made by the secretary that the Appellant was entered for the 250 shares by mistake, the case cannot be brought within *Miller's Case* (4) and other cases of that class.

Buckley, Q.C., and *Chadwyck Healey*, for the registrar:—

The question is whether when you find in the articles or regulations that a director shall possess a certain share qualification, and a person accepts the office and acts after the time by which the qualification must be acquired, he has contracted to take that number of shares. We contend that there is a contract of that nature. By sect. 16 of the Act all members are bound by the articles. *Jobling* signed the memorandum and took ten shares, he therefore was a member. All the stipulations of the articles therefore were binding between him and the company. It was decided in *Eley* v. *Positive Life Assurance Society* (5) that nothing in the articles can ever constitute a contract enforceable by an outsider; but that does not touch our case. *Jobling* was not an outsider; he was a member of the company and bound by the articles, and those articles imposed upon any person becoming a director a duty to take shares. In substance each shareholder covenanted that if he became a director he would contract to take shares. If, then, a member becomes a director he is bound to take the shares from somebody. *Brown's Case* (6) decided that he was not bound to take them from the company, but it decided nothing more. *Brown* had taken the requisite number of shares from some one else, so it was unnecessary to decide whether he was bound to take shares at all, but the remarks of Lord *Selborne* (1) tend to shew that he was. In *Karuth's Case* (2) the Master of the Rolls says that the acceptance and acting will be taken as an implied agreement by the director to qualify himself. *Miller's Case* (3) has been relied on as shewing that acceptance and acting amount to a contract to take shares from the company. That, according to *Brown's Case* (4), is not the law, but the question whether the shares must be taken from the company does not affect the present case. In *Hamley's Case* (5) the same principle is laid down as in *Karuth's Case.*

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(1) Law Rep. 2 Eq. 567.
(2) Ibid. 20 Eq. 506, 511.
(3) 3 Ch. D. 661, 665.
(4) 3 Ch. D. 661.
(5) 1 Ex. D. 20, 88.
(6) Law Rep. 9 Ch. 102.

[COTTON, L.J.:—There are cases in which Judges have suggested grounds on which a director who had not taken shares might be put on the list for the amount of qualification, but have you any case in which it has been done?]

There are four under special Acts where it has been done, and which it is difficult to distinguish from the present case: *Kincaid's Case* (6); *Forbes' Case* (7); *Purcell's Case* (8), referred to 25 Ch. D. 291; *Portal* v. *Emmens* (9).

[COTTON, L.J.:—Does not *Onslow's Case* (10) decide the present?]

No; in that case the company while a going concern had repudiated the contract, and it was impossible for the liquidator to have specific performance of it. So in *Mackley's Case* (11) a subscriber to the memorandum of a company all the shares in which were allotted to other people was held not a contributory. The cases in which a director was held liable for qualification shares which had been put into his name without his knowledge, must go on the principle that he was under a previous contract to take them, for no contract could arise from his being put on the register for them without his knowledge.

COTTON, L.J.:—

This is an appeal by Mr. *Jobling* from a decision of the Vice-Warden of the Stannaries placing him on the list of contribu-

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(1) Law Rep. 9 Ch. 105.
(2) Ibid. 20 Eq. 506, 511.
(3) 3 Ch. D. 661.
(4) Law Rep. 9 Ch. 102.
(5) 5 Ch. D. 705, 707.
(6) Law Rep. 11 Eq. 192.
(7) Ibid. 19 Eq. 353.
(8) 29 W. R. 170.
(9) 1 C. P. D. 664.
(10) 3 Times L. R. 551.
(11) 1 Ch. D. 247.

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tories in respect of shares which he never agreed with the company to take, unless he is to be held to have done so by signing the memorandum of association and accepting the office of director, and continuing to act as such after the time at which, according to the articles, he vacated his office if he did not hold the specified number of shares.

I am of opinion that the decision of the Vice-Warden is erroneous. To make a person liable to contribute to the assets of the company he must, under sect. 38 of the *Companies Act*, 1862, be a member, *i.e.*, according to sect. 23 he must have agreed to take shares. It is not necessary that he should actually be on the register, his agreeing to take shares is enough, but the agreement must be with the company. If *A.* agrees with *B.* to take shares from him, whatever right *B.* may have against *A.* to be indemnified, the company has nothing to do with *A.*, and he cannot be placed on the list of contributories unless the shares have been actually transferred to him.

Now, is there here any agreement by Mr. *Jobling* with the company to take 250 shares? Art. 89 provides that the qualification of a director shall be the holding of preference shares of the nominal value of £250 at least, and that a director may act before acquiring his qualification, and art. 91 provides that he shall vacate his office if he does not acquire the qualification within three months after his election. Mr. *Jobling* was not an original director. He subscribed the memorandum of association for ten shares, and in respect of them he admits that he is a contributory. He was afterwards elected a director, but he never applied for any shares besides his original ten shares. It is said that the articles contain a contract by him with the company that he will take the shares necessary for his qualification, but in my opinion they do not. Sect. 16 of the Act provides that the articles when registered "shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affirmed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles subject to the provisions of this Act." It is conceded that the regulations are only to bind the company and the members of the company *inter se*. It may be that the Appellant has bound himself to his fellow members to this extent: "If I become a director it is my duty to qualify myself by taking shares." But during three months he is at liberty to act without any qualification, and I think it would be wrong to say that his continuing to act after that period amounts to a contract to take shares within the meaning of sect. 23. No case has ever decided that acting as a director amounts to an agreement to take the shares requisite for a qualification. There are cases where a director has been held not liable for the shares requisite to qualify him; there have in some cases been observations to the effect that acceptance of the office and acting as director may make a person liable as if he had taken the qualification, but no Judge has ever acted on that view.

Some cases have been referred to relating to shares in companies formed by special Acts of Parliament. In my opinion they cannot govern the present. If Parliament thinks fit to say that certain persons shall be members, it can do so, and members they must be; but they become so by force of the Act of Parliament, not by agreement. Here the question is whether the Appellant agreed to take shares, and I think it would be wrong to say that the acceptance of the office of director, and acting in it, made such an agreement. A director may estop himself from disputing his being a shareholder, as where a director without his knowledge was entered on the register for the qualification shares, and was held to be fixed with them because he, being a director, must be presumed to have known of the entry; but, having regard to the nature of the entries in this case, I think that principle cannot be applied here.

LINDLEY, L.J.:—

This case arises under articles of a peculiar description. I will clear the ground by saying that the evidence falls very far short of what is required to estop the Appellant from denying that he is a holder of 250 shares. He, therefore, can only be put on the list in respect of them on the ground that he agreed to take them. Is it made out that he did so agree? In my opinion it is not. The Appellant was authorized by the articles to act as

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director for three months without qualification. At the end of those three months the sheriff was in possession of the mine under an execution against the former proprietors, and there was no prospect of the company being carried on. I cannot, under these circumstances, draw from the mere fact of his continuing to act as director the inference that he agreed to take the shares requisite for his qualification. I am one of those who think that the law on this subject is not on a satisfactory footing, and that it would be just for a person who acts as director to be held liable for the shares without which he had no right to act, but that does not enable us to infer an agreement to take them.

BOWEN, L.J.:—

I am of the same opinion. I agree that there is no estoppel, and that if the Appellant is to be on the list it must be by virtue of an agreement within the meaning of sect. 23 to become a member, that is to say, an agreement to that effect with the company. Where is such an agreement to be found? The Appellant signed the memorandum of association, and therefore, by virtue of sect. 16, he became bound to the same extent as if he had signed and sealed the articles, and they had contained a covenant by him to conform to all the regulations contained in them. But has he entered into any contract to take shares, because he has bound himself to conform to the regulations contained in the articles, including, of course, those as to the qualification of directors? There is no provision in the articles that the directors shall take the shares required for qualification, or be liable as if they had taken them. There is only a provision that if a director does not acquire the requisite number of shares within three months he shall cease to be a director. That regulation makes it his duty not to act after the three months; but that is quite different from a regulation that if he continues to act he shall be deemed to have contracted to take them. That seems to me to dispose of the case. I do not say that the present case is governed by *Onslow's Case* (1), for that case is not sufficiently reported to be relied on, and I was struck by the observa-

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(1) W. N. 1887, p. 79.

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tions of Mr. *Buckley* upon it, but I think we ought to affirm the principle which Mr. *Grosvenor Woods* cited it to establish.

Solicitors for Appellant: *Street & Poynder*, agents for *F. Hearle Cock, Truro.*

Solicitors for Respondent: *Rowcliffes, Rawle & Co.*, agents for *Hodge, Hockin & Marrack, Truro.*

H. C. J.

In re WEST DEVON GREAT CONSOLS MINE.

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Feb. 8.

Stannaries Act, 1869 (32 & 33 *Vict. c.* 19), *s.* 32 [*Revised Ed. Statutes, vol. xvi. p.* 22]—*Specific Enactment not repealed by General One—Security for Costs of Appeal—Consent by Counsel—Withdrawal of Consent—Mistake.*

Sect. 32 of the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), which requires a deposit of £20 to be made on all appeals from the Vice-Warden, is not abolished by the *Judicature Acts* and the General Orders made under them.

Some contributories appeared before the Vice-Warden to oppose the admission of certain claims in a winding-up. The Vice-Warden decided that the claims must be admitted. The counsel of the opposing contributories undertook not to appeal, and their costs were given them out of the estate. Before the order was passed and entered, they applied to have this undertaking omitted, on the grounds that counsel could not give a consent not to appeal, that he could not give a consent after a decision on the merits, and that the consent was given by mistake, as the decision of the Vice-Warden turned on a resolution of the company which they had not seen, and that if they had known its terms the consent would not have been given. It appeared, however, that the resolution had been read in Court on a former day:—

Held, that counsel had authority to consent not to appeal, and that as the opposing contributories had had an opportunity of becoming acquainted with the terms of the resolution, there was no such mistake as to entitle them to withdraw their consent.

A QUESTION as to admitting certain claims made in the winding-up of this company was argued before the Vice-Warden of the Stannaries. Certain contributories appeared by counsel and argued against the claims being admitted. On the 21st of October, 1887, his Honour made an order admitting the claims. The order then proceeded, "And the above-named opposing contributories undertaking by their said counsel not to appeal or to

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raise any objection in the winding-up as to bearing their respective shares of the said claims, it is ordered that the taxed costs of all parties of and incidental to the hearing of the said claims be paid out of the assets of the said company."

It was admitted that this undertaking was given by the counsel for the opposing contributories. It was given after the Vice-Warden had decided to allow the claims, but before any decision as to the costs had been given, and it was given with the approbation of the solicitor, but without any express authority from the clients.

The solicitor of the opposing contributories deposed that the judgment of the Vice-Warden proceeded on the ground that the shareholders of the company had by a resolution passed on the 10th of October, 1885, at a duly constituted meeting, sanctioned the incurring the expenses in respect of which the claims now in question were made; that neither the deponent nor the opposing contributories had seen that resolution; that it was not before the Court on the 21st of October; and that if the deponent had known its contents to be what he subsequently found them to be he should not have assented to the giving the undertaking.

It appeared, however, that though the book containing the resolution of the 10th of October, 1885, was not before the Court on the 21st of October, 1887, it had been produced on the 30th of August, 1887, when the question decided on the 21st of October, 1887, was first argued, and that the resolution in question had then been read.

The opposing contributories moved before the Vice-Warden to vary the order of the 21st of October, 1887, by striking out the undertaking. The Vice-Warden refused the application, and the opposing contributories appealed from this refusal.

The appeal was heard on the 8th of February, 1888.

Stock, for the Registrar of the Stannaries, as official liquidator:—

I take the preliminary objection that no deposit has been paid pursuant to the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), s. 32. By the *Judicature Act*, 1873, s. 18, sub-s. 3, the appellate jurisdiction of the Lord Warden was vested in the Court of Appeal, but by sect. 23, subject to any orders of the Supreme Courts, it is to be exercised in the same manner as before, and there is nothing in the Act of 1875 or the Rules to affect the saving. The 24th section of the Act of 1875 gives power to alter the rules in the Stannaries Court, but that power has not been exercised. The old practice continues till rules are made for the express purpose of altering it.

Buckley, Q.C., and *Bramwell Davis*, appeared for the other Respondents.

Napier Higgins, Q.C., and *Grosvenor Woods*, for the Appellants:—

Sect. 32 of the *Stannaries Act* only applied to appeals to the Lord Warden. The *Judicature Acts* give a new statutory right of appeal, and Order LVIII., rule 1, of the Rules of 1883 places all appeals on the same footing. The Stannaries rule as to a deposit, which arose on petitions of appeal, is therefore no longer applicable. Mr. *Buckley's* clients, at all events, cannot insist upon it, for the case was in the paper some days ago, and stood over for them to answer affidavits, without this objection being taken.

COTTON, L.J.:—

The deposit of £20 was required for the protection of Respondents, and it is a benefit which they can waive. Mr. *Buckley's* clients have waived it by their conduct, and we think the case ought to go on upon an undertaking to pay the £20 to the Registrar if the Court requires this to be done.

LINDLEY and BOWEN, L.JJ., concurred.

The undertaking was given.

Napier Higgins, Q.C., and *Grosvenor Woods*, for the appeal:—

The order has not been passed and entered, and we ask to have the undertaking not to appeal omitted. We contend that an undertaking not to appeal does not come within the authority of counsel, though, no doubt, as a general rule he has authority to give a consent: *Matthews* v. *Munster* (1). Still the order not having been passed and entered, the consent, having been given by mistake, may be withdrawn: *Harvey* v. *Croydon Union Rural Sanitary Authority* (2); *Rogers* v. *Horn* (3); *Holt* v. *Jesse* (4). Again, we say that a consent order which puts an end to the argument stands on a higher footing than a consent like the present, given after an adverse judgment on the merits has been pronounced: *Goring* v. *Lloyd* (5); *Craven* v. *Stanley* (6). A consent given after decision ought to be held revocable.

Buckley, Q.C., and *Bramwell Davis*, and *Stock*, for the Respondents, were stopped by the Court.

COTTON, L.J.:—

This is an application for leave to withdraw a consent given by counsel on the hearing of a motion before the Vice-Warden of the Stannaries. Though the order has not been drawn up, the consent cannot be withdrawn unless some error is shewn which satisfies the Court that the consenting party ought not to be bound. In *Harvey* v. *Croydon Union Rural Sanitary Authority* Mr. Justice *Pearson* considered himself bound to hold that, except in the case of a consent to a compromise sanctioned by the Judge, a party could withdraw his consent at any time before the order was passed, but the Court of Appeal decided that it could not be withdrawn arbitrarily, but only on the ground of mistake or surprise, or for some other sufficient reason.

On the hearing of the motion as to allowance of the claims, the Vice-Warden decided in favour of the claims, but the case was not ended, for he had not decided anything as to costs. Then, on counsel for the contributories consenting not to appeal, he allowed them their costs. The questions were raised in argument whether an undertaking not to appeal could be given at all by counsel without express authority, and if it could, whether it could be given after a decision on the merits. Now every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his clients shall not appeal. As to the other point the counsel in fact says: "The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it." That is a compromise. The undertaking, therefore, is *primâ facie* binding.

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(1) 20 Q. B. D. 141.

(2) 26 Ch. D. 249.

(3) 26 W. R. 432.

(4) 3 Ch. D. 177.

(5) 3 Times L. R. 456.

(6) 20 Sol. J. 542.

Then what case is there of mistake or surprise? I do not see any error as to matters of fact. It may be that counsel relied too much on the opinion of the Vice-Warden as to the effect of the resolution of the 10th of October, 1885. That at most comes to this—that counsel was mistaken in supposing the Vice-Warden to have stated the effect of the resolution correctly, but that is not such a mistake as will avoid a consent. It is said that the document was not before the Vice-Warden at the time, and that appears to be the case, but it had been read before him on a former occasion, and the Appellants had had full opportunity of becoming acquainted with the terms of the resolution, and cannot set up the case that they did not know them, as establishing a title to relief on the ground of mistake.

The question remains to be considered whether it was necessary for the Appellants to make a deposit of £20 as required by the *Stannaries Act*, 1869 (32 & 33 Vict. c. 19), sect. 32. It was argued that this was done away with by the *Judicature Acts* and the general rules, which give a right of appeal without requiring any deposit, only authorizing the Court of Appeal to require it when there are special circumstances. The section of the *Stannaries Act* gave a special protection to a litigant who had been successful before the Vice-Warden, and I am of opinion that neither the *Judicature Acts*, nor the general rules made under them, take it away. Assuming, without deciding, that the Rules Committee had power to take it away, they have not purported to do so, for general rules would not do away with this special direction to which they do not expressly refer.

What, then, ought to be done now? We have held that Mr. *Buckley's* clients had waived their right to a deposit by asking for the appeal to stand over without raising the question. The liquidator did not then appear, but after the appeal had been ordered to stand over he filed affidavits. We think that he did

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not by this waive his right to a deposit. Mr. *Higgins* undertook to pay it if required. If the liquidator is satisfied as to the solvency of the Appellants, there is no need to act on the undertaking, if he is not, the Appellants' solicitors must undertake to pay the liquidator's costs to an amount not exceeding £20.

LINDLEY, L.J.:—

I entirely agree.

BOWEN, L.J.:—

I am of the same opinion. As regards the deposit, the rule "*generalia specialibus non derogant*" applies, and I remember it having been similarly applied by the Court of Appeal as to a special rule relating to costs in a County Court.

Solicitors for the Appellants: *Snell, Son, & Greenip.*
Solicitors for the Registrar: *Coode, Kingdon, & Cotton.*
Solicitors for the other Respondents: *Kerly, Son, & Verden.*

H. C. J.

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Feb. 10, 13.

COOKE *v.* NEW RIVER COMPANY.

[1886 C. 2392.]

New River Company—Supply by Meter—"Dwelling-house."

A person requiring a supply of water in a house for domestic purposes and also for purposes for which no rate is fixed by the *New River Company's Act*, 1852, is not entitled, under sect. 41 of the Act, to require the company to supply by meter the water for domestic purposes as well as the water for other purposes.

Judgment of *Kekewich*, J., reversed.

Semble, that any house in which water is required for domestic purposes is a "dwelling-house" within the meaning of sect. 35 of the Act, though no person sleeps or takes meals there.

THE Plaintiffs carried on business as carpet warehousemen at 12, *Friday Street*, in the city of *London*, on premises which they had occupied from 1870. By par. 1 of their statement of claim they alleged, "The said hereditaments are in a street within the limits of the Defendants as defined by the *New River Company's Act*, 1852, in which street are laid pipes of the Defendants."

The property consisted of a warehouse of six storeys, all of which were used for storing carpets. Access from one to another was obtained by an internal staircase and a hydraulic lift. Each floor ran through the whole length and breadth of the building. There were no internal partitions, except that a small space of each floor was partitioned off as a counting-house. About fifty persons were employed; no one took his meals in the building, and there was no provision for cooking or supplying food. No one was on the premises except during the hours of business from 8 A.M. to 8 P.M.

Until shortly before the commencement of this litigation the *New River Company* supplied water to the premises by two pipes. One pipe was for working the hydraulic lift, and the water was supplied by meter under an agreement of November, 1871, between the Plaintiff and the company. The other pipe supplied water for drinking purposes and for the purpose of being used in urinals, water-closets, and wash-hand basins, and for washing the house. There was no meter on this pipe, and the Plaintiffs were charged according to the rateable value of the premises.

In the summer of 1886, the Plaintiffs gave notice to the company to determine the agreement of November, 1871, and called upon the company to supply the premises with water for all purposes by meter. This the company refused to do, and on the 23rd of June, 1886, this action was commenced. By their statement of claim the Plaintiffs claimed a declaration, "that they as consumers of water supplied by the Defendants under the *New River Company's Act*, 1852 (1) and the Acts incorporated there-

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(1) 15 & 16 Vict. c. clx.:

Sect. 35. "That the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at the rates hereinafter specified (that is to say): For water supplied to any dwelling-house: Where the annual value of the dwelling-house shall not exceed £200 at a rate per centum per annum on such value not exceeding £4: Where such annual value shall exceed £200, at a rate per centum per annum on such value not exceeding £3: If there be a water-with, are entitled to have water supplied by meter by the Defendants to their warehouse, No. 12, *Friday Street*, in the city of *London*, for the purpose of working a lift necessary for the carrying on of their business, and also for all other purposes in connection with the same hereditaments, at the charges provided by the 41st section of the *New River Company's Act*, 1852."

The company by the 4th paragraph of their defence said: "The defendants do not and never did contend that in respect of water used for the purposes of the hydraulic lift (being a machine or apparatus within sect. 38 of the *New River Company's Act*, 1852) or for any non-domestic purpose, payment must be made on the basis of annual value of the hereditaments, and they never by letter or otherwise refused to supply water by meter to the Plaintiffs for any such purpose. The Defendants submit that the Plaintiffs are not entitled to such supply for non-domestic purposes at the rates mentioned in sect. 41 except by agreement, and they are ready and willing to enter into an agreement for the

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closet or water-closets, or fixed bath or baths, or any high service in such dwelling-house or place, then, in addition to the rates above specified, the following rates shall be payable (that is to say): Where the annual value of such house shall exceed £30 but shall not exceed £50 a rate not exceeding 4*s.* per annum for each single water-closet, fixed bath, or high service, and a further sum of 2*s.* for each additional water-closet, fixed bath, or high service." The section went on to fix the extra rates for houses from £50 to £100, £100 to £200, £200 to £300, and £300 and upwards.

Sect. 38. "That a supply of water for domestic purposes shall not include a supply of water for steam-engines or railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for baths, horses, cattle, or for washing carriages, or for gardens, fountains, or ornamental purposes, or for flushing sewers or drains, or for any trade or manufacture or business requiring an extra supply of water."

Sect. 40. "That the company may supply any person or body within their limits with water, to be used within such limits for other than domestic purposes, at such rate and upon such terms and conditions as shall be agreed upon between the company and the person or body requiring such supply."

Sect. 41. "That the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter or other instrument or mode for measuring and ascertaining the quantity of water so supplied, and may charge for such supply not exceeding the following rates per 1000 gallons (that is to say): When the quarterly consumption of water shall not exceed 50,000 gallons, 7½*d.*" . . . .

supply of water to the Plaintiffs by meter for their hydraulic lift, or for any other non-domestic purpose, and as to the rates to be charged for the same."

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Mr. Justice *Kekewich* decided that the company were bound to supply water to the premises by meter for domestic purposes as well as for the lift (1).

The company appealed, and the appeal was argued on the 10th of February, 1888.

Sir *R. E. Webster*, A.G., *Warmington*, Q.C., and *V. Hawkins*, for the appeal:—

We say that "dwelling-house" in sect. 35 is used in a wide sense, and is not to be confined to a house in which people live, but includes every building which is so far a dwelling-house as to require water for domestic purposes. The Plaintiffs, then, are entitled to a supply for domestic purposes, but they are only entitled according to the rates provided by that section, *i.e.*, they must pay for it according to the rateable value of the house. Sect. 41 only enables a consumer to require a supply by meter for purposes other than the purposes for which rates had been fixed in the earlier part of the Act. *Metropolitan Board of Works* v. *New River Company* (2) supports our construction of sect. 41, that it is not compulsory, for "shall" is connected not only with what the company do at the request of the consumer but with what they do of their own accord.

Sir *H. Davey*, Q.C., *Finlay*, Q.C., and *Dobbs*, for the Plaintiffs:—

We contend that sect. 35 provides only for a supply of water for domestic purposes to dwelling-houses, that this is not a dwelling-house, and that therefore no rate is fixed for its supply by that section, and that sect. 41 applies to every case where a supply is required for which a rate is not fixed by the previous sections. Our view makes the Act reasonable, for if the water required in City buildings is to be paid for according to their rateable value the payment will be out of all reasonable proportions to the quantity of water consumed. Now, as to sect. 35, the Appellants wish to make "dwelling-house" synonymous with "building," but why should it not have its proper sense?

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(1) 36 Ch. D. 641. (2) 37 L. T. (N.S.) 124; S. C. in C. A. not reported.

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[COTTON, L.J.:—The 35th section speaks both of "house" and "dwelling-house." Which is the governing word? Do you say that you are not within sect. 35?]

That is what we contend for—that sect. 35 applies to nothing but dwelling-houses—no charge is made except for a supply to dwelling-houses. This building is in no sense a dwelling-house. Then sect. 41 requires the company to give a supply by meter in all cases where a rate has not been prescribed by the Act. "Consumer of water" must mean a person occupying a building for which he wants a water supply, otherwise the Act would make the actual consumption precede the obligation to supply the water.

[BOWEN, L.J.:—May not clause 41 be read: "The company shall—at the request of any consumer of water—for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided."]

The words "at their own instance" will not fit in with that construction.

[BOWEN, L.J.:—How do you construe those words?]

As laying down that the company may at their option insist on supplying by meter. If "consumer of water" means a person actually consuming water—a person who does not want water for domestic purposes cannot get a supply for other purposes at all.

Sir *R. E. Webster*, A.G., in reply:—

We contend that the company is bound to supply water for domestic purposes to every building, whether it is in the ordinary sense of the word "a dwelling-house" or not, and that whoever has such a supply is entitled to call upon the company for a supply by meter for any other purposes.

1888. Feb. 13. COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich* that under sect. 41 of the *New River Company's* special Act the Plaintiffs were entitled to demand a supply of water by meter for domestic purposes at the rates therein mentioned. The question turns upon the proper construction of sect. 41 of the Act, though undoubtedly other sections, and also sections of the general Act, are to be looked to for the purpose of seeing what is the right interpretation of that section.

Under an agreement which subsisted for some years between the Plaintiffs and the *New River Company*, the Plaintiffs took and the company supplied water, but that agreement has come to an end, and the parties have not been able to come to terms as to renewing it. This house, belonging to the Plaintiffs, is very much of a warehouse, but in certain portions of it they require water for what the Act calls domestic purposes. They have a hydraulic lift there for which they require water, and the company are perfectly ready to supply water for that purpose according to meter; but the Plaintiffs say: "This is not a dwelling-house, and you must, for domestic purposes as well as for the purposes of the lift, provide us with water by meter." Mr. Justice *Kekewich* has decided that under sect. 41, which enacts that the company "shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter," the company are bound to supply water by meter to the Plaintiffs for domestic purposes in the building in question. It was contended on behalf of the company by the Attorney-General that the word "shall" in that section cannot be treated as compulsory, for, as he very truly said, that "shall" is coupled not only with what is to be done at the request of any consumer, but also with what may be done "at their own instance," and that compulsion is out of the question as to what they are going to do at their own instance—that is, because they desire to do it. That is very true. The section is very badly framed, but I think that we ought to give "shall" a meaning of compulsion where it applies to what is to be done at the request of every consumer, although where it applies to what is to be done at the instance of the company, then of necessity "shall" cannot have the sense of compulsion. The section, in fact, ought to be read, "they may, if they like, at their own instance, but they *shall* where they are required to do so by any consumer." But who can compel them, and what he can compel them to do, is another question.

It has been contended on behalf of the Respondents that "any consumer of water" means any person who desires to consume water—who desires to have from the water company water that he may consume. Now I have read the special Act and I have read the general Act, for the purpose of seeing whether there is anything that can enable us or require us to give other than the natural construction to these words "any consumer," and I can find nothing. That being so, according to the legal rules of construction, which are, of course, proper rules, we must give the words their ordinary meaning; and in my opinion "any consumer of water" must mean a person who is consuming water, or it may be a person who, by virtue of an agreement with the company, or under other sections of the Act, can compel them to supply him with water, and is desirous of exercising that right.

Then for what purposes can he require water to be supplied to him by meter? It is "for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited." Now sect. 35 provides that water shall be supplied for domestic purposes and for some purposes which are not under the Act domestic purposes (for fixed baths are by sect. 38 said not to be domestic purposes) at the rates thereinafter specified, and it goes on to provide a rate for domestic purposes, and for some purposes which according to sect. 38 are not domestic purposes. But there is an expression in that section which has given rise to an argument as to the construction of sect. 41. For it was contended by Sir *Horace Davey* that "other than the purposes for or in respect of which the rates or charges are hereinbefore provided" must mean other than the purposes of use for domestic purposes in a dwelling-house, because he says no rate is fixed except a rate for a supply of water for domestic purposes in a dwelling-house. Now I do not think that under sect. 35 the rates are fixed only for what would be called a dwelling-house in ordinary parlance, or in legal parlance otherwise than for the purposes of this Act, for sect. 53 of the general Act contains a power to the occupier of every dwelling-house, when he has done certain things, to require a sufficient supply of water for his domestic purposes at the rate mentioned in the special Act. Sect. 34 gives a right to certain persons on certain conditions to require a supply of water where the mains have been already extended to the neighbourhood of the houses occupied by them. Then by sect. 35 "the company shall, at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid" ("pipe" there undoubtedly means "main") "or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes,"—that would probably refer to those persons who, though not living in the street where there are already mains of the company, acquired the right under sect. 34 to compel the company on the conditions therein mentioned to extend their mains into their street, so as to enable them to get a supply of water. Then what right does the section give to the owner or occupier—"shall be entitled to demand a supply of water for domestic purposes at the rates hereinafter specified." Then it goes on, "that is to say, for water supplied to any dwelling-house." Then it fixes the amount of rate to be paid according to the annual value of the house. Then it goes on in these terms: "If there be a water-closet or water-closets or fixed bath or baths or any high service in such dwelling-house or place, then, in addition to the rates above specified, the following rates shall be payable (that is to say)." Now, as I mentioned already, that is including within this section that which sect. 38 says is not a domestic purpose. It is true that the rate is fixed with reference to the annual value of the "dwelling-house," but I think (though we do not decide the point, as it is unnecessary to do so) that in this section "dwelling-house" is used for any house which is so far adapted for the purposes to which a dwelling-house is usually adapted as to require water for domestic purposes, though it may not be a dwelling-house within the meaning of other Acts of Parliament. It does not necessarily follow that the rate is to be fixed according to the value of the whole house, for the power is given "to the occupier of a house or part of a house," and there may be circumstances under which water is demanded for part only of the house, and it may be that that part of the house is to be considered within the purposes of

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this section as a dwelling-house, and that then the annual value of that part would fix the amount of the annual rate to be paid to the water company. In my opinion, however, we have not to consider whether in the present case there is a right to charge according to the whole value of the house, because, in my opinion, "purposes other than those for which rates or charges are hereinbefore provided or limited" refers only to the purposes, and is not necessarily confined to use for those purposes in a dwelling-house.

Then as to the meaning of "consumer of water." My opinion is that it means a person who either under the previous section actually enjoys or is consuming water, or is entitled so to do and has intimated his intention so to do for domestic purposes. I think that under sect. 41 if he requires water for any other purpose he may claim to be supplied with such additional water by meter at the rate mentioned in this section. The occupier of a dwelling-house who has, at the rates prescribed by sect. 35, water for purposes strictly domestic, and for those other purposes mentioned in that section, which, according to sect. 38, are not domestic, may say, "I require water for purposes for which I am not entitled to use the water with which you supply me, and I demand for that a supply of water by meter." On the other hand the company may say, "You are entitled to water for domestic purposes and for certain other defined purposes: now we strongly suspect that you are using the water not solely for those purposes, and therefore, unless you satisfy us that that is not so, you must take by meter the water which you require to water your conservatory or for any other purposes not within sect. 35." That will give, I think, a reasonable meaning to the words "at their own instance," they were inserted in order to prevent any questions between the company and their customer as to whether he is applying the water supplied, only for the purposes mentioned in sect. 35, or for other purposes to which he is not entitled to apply the water. But in the present case, without deciding whether this is a dwelling-house or not within the meaning of sect. 35, the Plaintiffs, in my opinion, have no right to demand that water shall be supplied to them by meter for all the purposes for which they want water in their building.

It appeared at first sight as if the case of *Metropolitan Board of Works* v. *New River Company* (1), in which the shorthand writer's note of the judgment of the Court of Appeal was furnished to us, decided the present case, but in reality it did not. The only decision there was, that the public purpose for which the *Metropolitan Board of Works* required the supply of water was provided for by sect. 37 of the general Act, and did not come under sect. 41 of the private Act, which latter section was to provide for purposes not of a public but of a private character.

In my opinion, therefore, Mr. Justice *Kekewich's* decision was erroneous, and must be reversed.

LINDLEY, L.J.:—

This question turns upon the construction of sect. 41 of the *New River Company's Act*, 1852, though in order to understand that section it is necessary to consider also other sections of the Act.

The Act is not drawn in language which is altogether free from difficulty, but in order to dispose of the question before us it appears to me sufficient to look at sects. 35, 38, and 41, and at the Plaintiffs' own statement of their case.

The Plaintiffs say in their amended statement of claim that they carry on the business of carpet warehousemen upon the hereditaments known as 12, *Friday Street*, in the city of *London*, and that they are the occupiers of those premises in the said street within the limits of the company as defined by the *New River Company's Act*, 1852, in which street are laid pipes of the Defendants.

Let us then look at sect. 35, which begins thus: "That the company shall at the request of the owner or occupier of any house or part of a house in any street within their limits in which any pipe of the company shall be laid," it then proceeds, "or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at the rates hereinafter specified." Now, stopping there, I fail altogether to see why the Plaintiffs are not precisely within the first part of that section. There is not a word there about dwelling-houses. We shall presently see what is said about dwelling-houses; but the Plaintiffs are on their own shewing occupiers of a house, or part of a house, in a street within the limits in which pipes of the company are laid. Then we come to the rates, and we find the language immediately varied, for the rates run in this way: "for water supplied to any dwelling-house." Then there is a reference to the annual value of the "dwelling-house," nothing being said about part of a "house" or "place." Then the section says, "If there be a water-closet or water-closets, or fixed bath or baths, or any high service in such dwelling-house or place," the language being again varied. No doubt the variation in language here, and the use of the words "dwelling-house," may be referred to in argument for the purpose of shewing that the expression "house" in the early part of sect. 35 means dwelling-house as distinguished from any other house. I doubt very much whether that is the true construction. I am disposed to think that anything is a dwelling-house within the meaning of this section, which is a house, and in which water is required for domestic purposes, or for any other purposes for which rates are fixed. I do not think it necessary to decide that question, but my impression is very strong that the Plaintiffs are within the wording of this section, and are entitled under it to a supply of water for domestic purposes under the schedule of rates in the section.

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(1) 37 L. T. (N.S.) 124.

Now it is very curious, and it shews how carelessly these Acts are drawn, that the schedule includes fixed baths; and then we are told by sect. 38 that baths are not intended to be included under the expression "domestic purposes." This is a blunder in point of language, but I do not think that it really affects the construction.

We then come to sect. 41, and of course if the Plaintiffs are entitled to water for domestic purposes under sect. 35 they are not within sect. 41 for the same water. Sect. 41 enacts, "That the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited, or at their own instance, afford a supply of water by means of a meter or other instrument or mode for measuring and ascertaining the quantity of water so supplied."

Now let us bear in mind what the controversy here is. The Plaintiffs by their statement of claim, asked for a declaration, and the learned Judge has made a declaration, that they as consumers of water supplied by the Defendants under the *New River Company's Act*, 1852, and the Acts incorporated therewith, are entitled to have water supplied by meter by the Defendants to their warehouse No. 12, *Friday Street*, for the purpose of working a lift necessary for the carrying on of their business. Now, as I understand it, there is no controversy before us about that lift. But then they go on further and ask for a declaration that they are entitled to a supply by meter for all other purposes in connection with the said hereditaments, that is to say, they contend they are entitled under sect. 41 to have water supplied by meter to this warehouse for domestic purposes, and Mr. Justice *Kekewich* has so held. Now, if I am right in the opinion that they are within sect. 35, then, of course, they are not within sect. 41, but even if they are not within sect. 35 it appears to me equally difficult for them to bring themselves within sect. 41. I do not propose to give any definition of the expression "consumer of water." It includes, of course, any person who is an actual consumer of water, and it would, I suppose, include a person who is entitled to claim a supply of water under the Act and has applied for it, although he has not actually been supplied. Whether any person who wanted water, and who had not come under any arrangements for getting it, would be a consumer, is a different question, which it is wholly unnecessary to decide on the present occasion. The key to the section appears to me to lie in the words, "For purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided or limited." Now the Plaintiffs want this water by meter for the purposes enumerated in sect. 35, and they cannot, therefore, it appears to me, without forcing and straining the language of sect. 41, bring themselves within that section even if they are not within sect. 35, as I think they are. Sect. 41 is very strangely worded; it says: "That the company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which

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the rates or charges are hereinbefore provided or limited, or at their own instance." That is very perplexing. The first words, "The company shall at the request of any consumer" are intelligible enough; they impose upon the company the obligation or duty of supplying water in the case provided for by the section if required by the consumer, but what is meant by saying "the company shall at their own instance"? It must mean that they shall be entitled to do it. It cannot mean that they shall be obliged at their own instance; there is no sense in that. "I must at my own instance" can only be understood as meaning "I may." Therefore, as I understand the section, it imposes upon the company the obligation of supplying water by meter at the request of the consumer when he is entitled to it under the section, and the section imposes upon the consumer the obligation of taking water by meter at the instance of the company in similar cases, that is to say, the obligation is imposed by the word "shall" in different ways—upon the company in the first part of the section, upon the consumer in the other. It appears to me, that whatever the true construction of sect. 35 may be, the Plaintiffs have completely failed in bringing themselves within sect. 41 so far as regards water required by them for domestic purposes.

BOWEN, L.J.:—

In my opinion the only section which it is necessary to construe here is sect. 41, and I have arrived at the conclusion that sect. 41, although not altogether aptly worded, becomes reasonably clear when you consider it in connection with the previous sections of the Act and with reference to the subject-matter.

Part of the difficulty of construing sect. 41 arises from an air of compulsion which seems to rest upon it in consequence of the words with which it begins, "the company shall," and the further embarrassment which is caused by the fact that after using words of compulsion in the earlier part of the section with regard to the company, the Legislature passes on to use words of option, still retaining the word "shall" when it deals with the action to be taken by the company on its own initiative. So that the section is a curiously worded one. The fact is that it breaks into two parts. The first deals with the action which is to be taken by

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the company upon the initiative of others, the second with the action which is to be taken by the company upon its own initiative. The first branch is "The company shall, at the request of any consumer of water for purposes other than the purposes for or in respect of which the rates or charges are hereinbefore provided." They are to act upon that branch on the request of the consumer of water if the purposes are other than the purposes which have been previously defined. Then comes the latter branch, which continues: "or at their own instance, afford a supply of water by meter." It seems to me that the word "shall" is compulsory when it is dealing with the action of the company set in motion by the request of the consumer, but that when it passes to the act of the company upon its own initiative it takes a colour from the words "at their own instance" which give to the word "shall," not altogether inappropriately, the meaning of "may." After all the word "shall" is only the future tense and colourless, but it may receive, and it does receive, in ordinary language either a compulsory colour or an optional colour from the context, and I do not think there is anything very violent (although it is not altogether an apt way of using it) in giving the optional meaning to it where you find it coupled with the phrase "at their own instance," just as you say that a person shall, if he chooses, go out for a walk, which means that he shall have the power of doing it.

But what we have to consider really is the first branch of this section, what is the limit of compulsion within which the company is obliged to act if there is a request by a consumer of water? First of all it seems to me that he must be a consumer of water. That is what the section says, and I think it would be doing strange violence to its language if we were to give it the meaning attributed to it by the learned Judge below. A "consumer of water" does not denote a person who desires to consume water but is not consuming it, any more than "customer of a firm" includes a person who at some future time intends to buy from it. "Consumer" must, to fulfil the ordinary conditions of the English language, be a person who is actually consuming or who is entitled to consume under some agreement made with the company, or some previous right given him by the Act of

Parliament itself, for I do not think it necessary that he should be actually consuming the water if he is in such a position that the company cannot refuse to give it to him and if he wishes to insist upon his right.

But then there is another limit upon the compulsion which is imposed on the company,—the request of the consumer is only to be imperative or obligatory if the purposes are other than the purposes for or in respect of which the rates are thereinbefore provided. Now rates are thereinbefore provided for domestic purposes, and for certain other purposes which it is not necessary for the present purpose to enumerate, because the consideration of them does not arise. Speaking broadly, the purposes for which the rates have been already fixed are domestic purposes. Then, coming back to the language of sect. 41, a consumer of water, if he wants to insist on supply by meter, can only do so for purposes other than those for which rates have been previously fixed.

The result is that the company, speaking broadly, subject to the exceptions created by special sections in the Act, are not bound to supply water for general trade purposes except to their own consumers. Then come the words "or at their own instance." One can easily conceive cases in which the company would be dissatisfied with the use which was being made of the water supplied for domestic purposes, or dissatisfied with constant controversies about it, and might choose to say "We elect to supply you altogether on the meter system although you are a consumer and have a right to water for domestic purposes." In the second branch of the sentence there is no limit as to the purposes for which the meter supply is to be used when the company put themselves in motion. When the consumer of water asks for a supply by meter he can only demand it for purposes outside domestic use, but the company may elect if they choose, for all purposes whatsoever, to impose a meter supply. That is no doubt in order to prevent disputes between customers and themselves.

If that is the true view of this section, the construction of the previous sections becomes unnecessary for the purposes of the present case, and, like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgments come with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that *obiter dicta*, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases. Therefore I abstain from putting a construction on more than it is necessary to do for this particular case.

Are the Plaintiffs consumers of water within the definition I have given? Are they persons who are entitled to consume already before you get to sect. 41? They occupy a house which is six storeys high, without any internal partitions, nobody sleeps in the house, nobody takes his meals in it, there are about twenty clerks and twenty porters employed there, and water is used for water-closets and lavatories, and for washing the house. I neglect the hydraulic lift. I by no means say that such persons are not occupying a house or part of a house which gives them a right under sect. 35 to water for domestic purposes. But it is not necessary to decide this point, for on sect. 41, as it seems to me, the Plaintiffs are in this dilemma. Are they already consumers of water within the meaning of the section for domestic purposes or not? If they are, what does the first branch of sect. 41 give them? Only a right to demand a meter supply for purposes other than domestic purposes, and this action is to demand it for domestic purposes. Therefore the section does not help them. If they are not, if this is not a dwelling-house, and they had no right to water under the section which prescribes the rates, they cannot demand water at all. It seems to me, therefore, that the argument of the Respondents must fail.

Solicitors for Plaintiffs: *Hollingsworth, Tyerman, & Andrewes.*
Solicitors for Defendants: *Thompson & Debenhams.*

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TIMSON *v.* WILSON.

[1887 T. 1457.]

FANSHAWE *v.* LONDON AND PROVINCIAL DAIRY COMPANY.

[1887 F. 837.]

Practice—Trial by Jury—Rules of Supreme Court, 1883, *Order* XXXVI., *rr*. 6, 7 (*a*).

Where, in an action brought in the Chancery Division to restrain a nuisance, either party applies for a trial by jury, he cannot claim a jury as a matter of right, but the application is one to the discretion of the Court under Order XXXVI., rule 7 (*a*), and he has not even such *primâ facie* right to a jury as to throw on the other side the burden of shewing that the case can be tried as well without a jury.

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THIS was an action in the Chancery Division for an injunction to restrain the Defendant from allowing sewage to flow from a cesspool at his house in *Hampshire* into a watercourse from which a pond on the Plaintiff's property, which was used for watering cattle, derived its principal supply of water. The Defendant alleged a prescriptive right to discharge sewage into the watercourse, denied any increase of the amount discharged, and stated that the distance of the pond from the cesspool was about three-quarters of a mile, that nothing which could create a nuisance reached the pond from the Defendant's premises, and that the pond was polluted from the Plaintiff's own premises.

On the 14th of September, 1887, before the statement of claim had been delivered, an order was made restraining the Defendant until the trial or further order from allowing the sewage from the cesspool to overflow into the watercourse.

The action being now ready for trial, the Defendant applied to have it transferred to the Queen's Bench Division that it might be tried at *Winchester* by a *Hampshire* jury. The grounds alleged were that the case could only be tried satisfactorily by a jury with a view; that it was desirable that the case should be tried by a jury knowing the habits of cattle; and that the witnesses lived in the neighbourhood, so that a trial at *Winchester* would save great expense.

It appeared that since the action was brought alterations had been made about the pond and the watercourse, and substantially there was nothing to be decided but the question of costs.

Mr. Justice *Kay* refused the application, and the Defendant appealed. The appeal was heard on the 29th of February, 1888.

Sills, for the appeal:—

This application is made under Order XLIX., rule 3, the case being one which can be much better tried by a jury than by a Judge. This is not an action assigned to the Chancery Division by Order XXXVI., rule 3, and under rule 6 the trial ought to be with a jury: *Fennessy* v. *Rabbits* (1).

Vernon R. Smith, contrà:—

The case is not governed by Order XXXVI., rule 6, but by rule 7 (*a*), under which the Judge has a discretion: *The Temple Bar* (2). Little remains here but the question of costs, and there is not sufficient cause shewn for interfering with the discretion of the Judge, which will not be done except on very strong grounds: *Ruston* v. *Tobin* (3).

Sills, in reply.

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THE Defendants carried on business as milk sellers and dairymen. The Plaintiffs were resident occupiers of houses near the Defendants' place of business, and complained of the Defendants carrying on their business at night in such a noisy way as to cause a serious nuisance to the Plaintiffs, and they commenced this action in the Chancery Division for an injunction to restrain the Defendants from carrying on their business in such a manner as by noise between the hours of ten at night and seven in the morning to cause a nuisance to the Plaintiffs. The Defendants by their defence denied the fact of nuisance.

On the 20th of December, 1887, the Plaintiffs gave notice for trial of the action before a Judge. The Defendants took out a summons asking that notwithstanding the notice the action might be tried by a Judge with a jury. Mr. Justice *Kay* in Chambers dismissed the summons with costs, saying that if he directed this action to be tried by a jury he might direct every nuisance action to be so tried. His Lordship gave leave to go direct to the Court of Appeal. The Defendants appealed, and the appeal was heard on the 29th of February, 1888.

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(1) 56 L. T. (N.S.) 138.

(2) 11 P. D. 6.

(3) 10 Ch. D. 558.

Ince, Q.C., and *Herbert Robertson*, for the appeal:—

We say that this case comes within Order XXXVI., rule 6, and that the Defendant has a right to a jury, this not being an action assigned to the Chancery Division so as to come within rule 3: *Fennessy* v. *Rabbits* (1). If, however, it comes within rule 7 (*a*), we say that the remark of the Judge shews that he did not exercise a discretion with a view to the particular circumstances of the case. Now, where a Judge exercises no discretion, or exercises it on a wrong principle, the Court of Appeal will interfere: *In re Martin* (2). The only cases in which it has been debated whether nuisance cases should go to a jury are *West* v. *White* (3), *Powell* v. *Williams* (4), and *Clarke* v. *Skipper* (5), and they are all in our favour. The last of them shews that there is a *primâ facie* right to a trial by jury, and that the burden of proof lies on those who contend for trial without a jury, Order XXXVI., rule 26, of the Orders of 1875 under which it was decided being in the same terms as Order XXXVI., rule 4, of the Orders of 1883. *In re Martin* also goes on the principle that unless special grounds to the contrary are shewn the person asking for a jury will have his *primâ facie* right.

Marten, Q.C., and *Russell Roberts*, *contrà*, were not called upon.

COTTON, L.J.:—

Both these cases come before us on appeal from Mr. Justice *Kay*, and in each of them the question is, whether the Appellants have a right to a trial by jury, or whether the Judge has a discre-

(1) 56 L. T. (N.S.) 138.
(2) 20 Ch. D. 365.
(3) 4 Ch. D. 631.
(4) 12 Ch. D. 234.
(5) 21 Ch. D. 134.

tion as to ordering the case to be so tried. Each of the actions before us is not one of those assigned to the Chancery Division, but is one which can be brought in that Division. We have not to deal with the 4th rule of Order XXXVI., the question is whether it comes within rule 6 or rule 7 (*a*) of that Order. In the case of *The Temple Bar* (1), we held, and as I think rightly, for reasons which I need not repeat, that rule 6 deals only with causes and matters not mentioned in the preceding rules. There is a means given by rule 7 (*a*) of applying to the discretion of the Court as to the mode of trial in cases not provided for by the preceding rules. Nothing is said as to the mode of applying. A discretion is given to the Judge which he may, no doubt, exercise *ex mero motu suo*; but if a rule gives a discretion to the Judge it would be wrong to say that the parties may not apply to him to exercise it. We must then consider the applications here as made under rule 7 (*a*). Mr. *Ince* urged that there was a *primâ facie* right to a jury, and that the case ought to be so tried unless the Judge satisfied himself that it was not one which ought to be tried by a jury, and a case was referred to, *In re Martin* (2), in which, under the then existing rule, the Court said that the Judge must be satisfied that there were reasons why the case should not be tried by a jury. Mr. *Ince* urged that this was in point, for that the new and the old rule (Rules of 1875, XXXVI., 26, and Rules of 1883, XXXVI., 4), are in the same terms. It may be that they are in the same terms, but they deal with different sets of rights. At the time when that case was decided a party had a right to give a notice requiring the action to be tried in a particular way. Order XXXVI., rule 3, of the Orders of 1875 enabled him to give notice for trial by jury. That was done, and then under rule 26 of the same Order reason had to be shewn why he should be deprived of his right under the notice. Under the present Rules there is not a general right to demand a trial by jury; parties have a right to demand it in certain actions of which neither of those now before the Court is one. Then comes in rule 7 (*a*), and under that rule it is for those who ask for a jury to satisfy the Court that the action ought to be tried by a jury.

(1) 11 P. D. 6.

(2) 20 Ch. D. 365.

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As regards *Timson* v. *Wilson,* I think I should have said that *primâ facie* it was an action proper for a jury, but I am not sure that I should have come to the same conclusion when it was shewn that there was little to be decided but the question of costs. But it is unnecessary to decide that, it is enough to say that no sufficient ground is shewn for interfering with the discretion of the Judge.

The other case appears to me a clear one. I do not see what use there would be in a view, unless by a view it is meant that the jury are to sit up all night to listen to the noise. The action is one which can be tried just as well by a Judge in the Chancery Division as by a jury.

Both appeals will therefore be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. As I said in *The Temple Bar* (1), the rules 2–7 of Order XXXVI. form a group of regulations hanging together and requiring to be read together. They form a new set of regulations as to trial by jury, and we should only be misled if we were to go back to decisions on the Orders of 1875. Order XXXVI., rule 4, may be in the same terms as Order XXXVI., rule 26, of the Orders of 1875, but the rules before it, in connection with which it must be read, have been recast, and its effect is thereby varied. Every party who before November, 1883, was entitled to trial by jury is so entitled still, and no party who before November, 1883, was not entitled to trial by jury is so entitled now. But there are cases in which the Court can order a trial by a jury where without such an order the trial would be without a jury, and so there are cases in which the Court can order a trial without a jury where without such an order the trial would be with a jury. The law in this respect was not new, for the Court of Chancery could direct an issue, which led to the insertion of the last words in rule 3 and rule 4, and the Courts of Common Law had the powers now conferred by rule 5. Rule 4 is confined to causes which under the old law could be tried without a jury without any consent, and it applies to Admiralty and Chancery actions. The effect of the Rules of 1883 was to make trial

(1) 11 P. D. 6.

without a jury the normal mode of trial except where trial by jury is ordered under rules 3, 6, or 7 (*a*), or may be had without an order under rule 2.

Rule 6 gives no right to trial by jury in any case which before could be tried without a jury, without any consent of parties: *The Temple Bar* (1). The actions now before us are actions for nuisance in the Chancery Division. These before the *Judicature Acts* would be tried by the Judge without a jury unless he saw fit to direct them to be tried with a jury. They come within rule 7 (*a*), and the trial without a jury being the normal mode of trial, those who ask for a jury must satisfy the Court that it is better for the action to be tried with a jury.

I agree with Mr. Justice *Kay* in both cases. In *Timson* v. *Wilson* the case is almost reduced to a question of costs, and as to the other case there is no reason why a question as to nuisance from the rattle of milk cans cannot be tried as well without as with a jury.

BOWEN, L.J.:—

I think we are bound by the decision in *The Temple Bar* (1) to hold that the Applicants cannot claim a trial by jury as a matter of right. Regarding the cases, then, as cases of discretion under rule 7 (*a*), I see no proof that the Judge did not exercise his discretion. I think that his language in the second case does not import, as has been contended, that he did not use his discretion with regard to the circumstances of the case, but that he considered the circumstances to be such that there was no occasion for a trial by jury unless it was to be laid down that every nuisance case must be tried by a jury, and in this conclusion I quite agree with him. As to *Timson* v. *Wilson* it at first struck me that I should not have exercised my discretion in the same way as the learned Judge; it appeared to be a case where it was hard to oblige the parties to bear the expense of bringing up their witnesses to town, and where a view was very desirable. It appears, however, that an interlocutory injunction was granted in which elaborate plans were laid before the Judge, so that there are materials which will greatly assist him at the trial; it appears, moreover, that no

(1) 11 P. D. 6.

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nuisance now exists, and the only question is whether the costs of the action should be borne by the Plaintiff or by the Defendant. Under all these circumstances I am not prepared to decide that Mr. Justice *Kay* exercised his discretion wrongly.

Solicitors in *Timson* v. *Wilson.*

Solicitors for Plaintiff: *Barlow & James.*

Solicitors for Defendant: *Upton, Atkey & Upton.*

Solicitors in *Fanshawe* v. *London and Provincial Dairy Company.*

Solicitors for Plaintiffs: *Kennedy, Hughes, & Kennedy.*

Solicitors for Defendants: *Frere, Forster, Frere, & Cholmeley.*

H. C. J.

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[1884 H. 3041.]

NORTH, J.
Oct. 29; *Nov.* 5, 7.
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March 3.

Married Woman—Separate Estate—Property acquired since the 1*st of January,* 1883—*Effect of Prior Settlement—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 5, 19.

The effect of sect. 19 of the *Married Women's Property Act*, 1882, is so to modify the operation of sect. 5, that the persons interested under a settlement of the property of a married woman are not by sect. 5 deprived of any benefit to which they would have been entitled under the settlement in case sect. 5 had not been enacted.

An ante-nuptial settlement executed in 1870, contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, on the death of the wife's mother, the wife became entitled under her will to a share of the mother's personal estate, which was not limited by the will to the separate use of the wife:—

Held (affirming the decision of *North*, J.), that this share was, notwithstanding the Act of 1882, bound by the covenant in the settlement.

In re Queade's Trusts (1) disapproved.

PETITION by Mrs. *Brown*, the wife of *G. W. Brown*, asking for the transfer to her of a sum of stock which was in Court to the credit of the action, "the account of Mrs. *Brown* and her assignees (if any), and her incumbrancers (if any)."

(1) 33 W. R. 816.

Mr. and Mrs. *Brown* were married on the 22nd of October, 1870. In contemplation of the marriage a settlement was executed on the 19th of October, 1870, and by it certain stock and shares which the intended wife (then Miss *Hancock*) was then possessed of or entitled to were assigned by her to the trustees of the settlement, upon certain trusts for the benefit of herself, her intended husband, and the children of the intended marriage. The settlement contained a covenant by *G. W. Brown* with the trustees that, in case at any time during the intended coverture any real or personal estate whatsoever (exceeding in amount or value £20 at one time and from one source, and not consisting of jewels, rings, or other articles of that nature) should be given, devised, or bequeathed to, or descend, or devolve upon, or vest in Miss *Hancock*, or any person or persons in trust for her, or in *G. W. Brown* in her right, then and in any and every such case *G. W. Brown* should and would, at the costs of the trust estate thereby created, make, do and execute, or cause to be made, done and executed, or join or concur with Miss *Hancock*, her heirs, executors, administrators and assigns, in making, doing and executing, all such acts, deeds, matters and things, as should be necessary or proper for vesting such real or personal estate in the trustees or trustee for the time being of the settlement, upon the trusts thereby declared, or such of them as should be then subsisting. The settlement did not contain any covenant by Miss *Hancock* for the settlement of her after-acquired property, nor any joint agreement or declaration to that effect.

On the 22nd of September, 1883, Mrs. *Hancock*, Mrs. *Brown's* mother, died, having by her will, dated the 6th of March, 1883, given the residue of her property to be equally divided between her children and the issue of any deceased child, such issue taking the parent's share. The will did not contain any declaration that the shares of daughters were to be for their separate use.

This action was brought to administer Mrs. *Hancock's* estate, and in it a sum of £1500 New 3 per cents., which formed part of Mrs. *Brown's* share of the residuary personal estate, had been carried over to the credit of the above account. The petition asked for a declaration that the Petitioner's share in the residuary

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estate of Mrs. *Hancock* under her will was not bound by the settlement, but that it belonged to the Petitioner for her separate use absolutely; and that the residue of the £1500, after the payment of costs, might be transferred to her. It was stated at the Bar that the testatrix had no real estate.

The petition came on for hearing before Mr. Justice *North* on the 29th of October, 1887.

Mulligan, for the Petitioner:—

There is no contract by the wife for the settlement of her after-acquired property; there is only the covenant of the husband, and such a covenant does not apply to the separate property of the wife: *Ramsden* v. *Smith* (1); *Dawes* v. *Tredwell* (2). There is not even a recital in the settlement of an intention that the wife's after-acquired property should be settled. Before the *Married Women's Property Act*, 1882, separate property of the wife would not have been bound by the covenant. The will was made after passing of the Act, and sect. 5 must be read into the will. The testatrix must be taken to have known of the existence of sect. 5 (3), and the effect of that section is to make the Petitioner's share under the will her separate property. Independently of sect. 19, she is clearly entitled to the share for her separate use, and the only question is, what is the effect of sect. 19. The words "settlement or agreement for a settlement" must mean a settlement or agreement which is binding upon the wife. In *In re Queade's Trusts* (4) Mr. Justice *Chitty* held that sect. 19 did not prevent the operation of sect. 5. In that case the settlement was a post-nuptial one, and at the date of its execution the wife was an infant. Therefore, notwithstanding

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(1) 2 Drew. 298.

(2) 18 Ch. D. 354.

(3) Sect. 5 provides that "Every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act."

The first clause of sect. 19 is as follows: "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman."

(4) 33 W. R. 816; 54 L. J. (Ch.) 786.

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that the husband and the wife purported to enter into an agreement for the settlement of her after-acquired property, she was not bound by the deed, and Mr. Justice *Chitty* held that property acquired by her after the Act came into operation belonged to her absolutely. In the present case the wife did not in fact enter into a covenant, though she might have done so, and in principle the two cases are undistinguishable. In *In re Stonor's Trusts* (1) Mr. Justice *Pearson* came to a contrary conclusion, but there the wife had entered into an agreement to settle her after-acquired property. In *In re Whitaker* (2) also the wife had entered into a similar contract, and the Court of Appeal held that sect. 19 prevented the operation of sect. 5. But they expressly abstained from giving any opinion upon the point decided in *In re Queade's Trusts* (3).

E. R. Simpson, for the trustees of the settlement:—

But for the Act of 1882 this fund would clearly have been bound by the husband's covenant, and must have been transferred to the trustees. If it is not bound now, the Act will have "interfered with or affected" the settlement. It will have altered the rights of the persons claiming under the settlement. That would be inconsistent with sect. 19. *In re Stonor's Trusts* is in favour of this view, and so is the *ratio decidendi* of *In re Whitaker*. In both those cases it was really the covenant of the husband which brought the property within the settlement. *Ramsden* v. *Smith* (4) and *Dawes* v. *Tredwell* (5) were decisions upon the construction of particular covenants to settle after-acquired property. The question in those cases was, whether the covenant was intended to apply to anything more than the husband's interest in the wife's property. A woman of full age who assents for valuable consideration to a deed by which her husband enters into a covenant is bound by it: *Lee* v. *Lee* (6). The settlement is the Petitioner's deed, and she has assented to its provisions.

This fund would become separate property of the wife only by virtue of sect. 5. But for sect. 5 the fund would have been bound by the covenant, and sect. 19 in effect says that, where there is a settlement, sect. 5 is to have no operation at all.

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(1) 24 Ch. D. 195.
(2) 34 Ch. D. 227.
(3) 33 W. R. 816; 54 L. J. (Ch.) 786.
(4) 2 Drew. 298.
(5) 18 Ch. D. 354.
(6) 4 Ch. D. 175.

Mulligan, in reply:—

Lee v. *Lee* (1) was prior to *Dawes* v. *Tredwell* (2). The object of the covenant in the present case was only to exclude the husband's marital right. *In re Queade's Trusts* (3) is directly in point, and in *In re Whitaker* (4) the Court of Appeal did not overrule it.

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The settlement made in October, 1870, previously to the marriage of the Petitioner, contained a covenant by her husband for the settlement of all her after-acquired real and personal estate, exceeding £20 in value. I have carefully compared the covenant with those in *Ramsden* v. *Smith* (5) and *Dawes* v. *Tredwell*, and, though there are slight verbal differences, I can find no substantial difference between it and them. In my opinion, according to its true construction, it is a covenant by the husband alone, and there is no covenant by the wife. [His Lordship stated the provisions of Mrs. *Hancock's* will, and the nature of the claim made by the Petitioner, and continued:—] The question is, whether, notwithstanding the covenant of her husband contained in the settlement, the Petitioner is, by virtue of sect. 5 of the *Married Women's Property Act*, 1882, absolutely entitled to a fund which came to her under the will of her mother, who made her will and died after the Act of 1882 had come into operation. Three cases have been cited as bearing on the point. The first of them was *In re Stonor's Trusts* (6), a decision of Mr. Justice *Pearson*. In that case an ante-nuptial settlement made in 1862 contained an agreement for the settlement of any after-acquired property of the wife above a specified amount, except interests restricted to the life of the wife or limited to her separate use. After the commencement of the Act of 1882

(1) 4 Ch. D. 175.
(2) 18 Ch. D. 354.
(3) 33 W. R. 816; 54 L. J. (Ch.) 786.
(4) 34 Ch. D. 227.
(5) 2 Drew. 298.
(6) 24 Ch. D. 195.

the wife became under her mother's will absolutely entitled to the residue of the mother's personal estate, which was not limited to her separate use, and Mr. Justice *Pearson* held that sect. 19 of the Act prevented the application of sect. 5, and that consequently the property was bound by the agreement. There was this distinction between that case and the present, that there the agreement was a joint one by the husband and the wife; the wife was bound by it as well as the husband. The next case was *In re Queade's Trusts* (1), before Mr. Justice *Chitty*, a case very like the present. There a post-nuptial settlement was executed in 1847, by which it was agreed and declared that all the after-acquired property of the wife should be settled. The *Married Women's Property Act*, 1882, came into operation on the 1st of January, 1883, and afterwards the wife, as one of the next of kin of a deceased person, became entitled to a share of his estate, and the question arose whether that share was bound by the agreement. The settlement was expressed in terms which were binding on both the husband and the wife, but the wife was not in fact bound by it, because it was a post-nuptial settlement, and she was an infant at the time when it was executed. It was exactly the same thing as if there had been no agreement by the wife, and the case was thus distinguishable from *In re Stonor's Trusts* (2). Mr. Justice *Chitty* held that the wife's share under the intestacy became by virtue of sect. 5 her separate property, and that it was excepted from the settlement. The third case was *In re Whitaker* (3), a recent decision of the Court of Appeal, which, it appears to me, settles the law, and which I am bound to follow. In that case, by an ante-nuptial settlement executed in 1873, the husband and wife had jointly covenanted to settle any after-acquired property of the wife, except jewels, &c., or any sum not exceeding in each case the amount of £1000, or any property settled to her separate use. Under the will of her father, who died in 1884, the wife became entitled to a sum of £10,000, which was not limited by the will to her separate use. The Court of Appeal held that the operation of sect. 5 of the Act was modified by sect. 19, and that, reading the two sections together, the share

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(1) 33 W. R. 816.
(2) 24 Ch. D. 195.
(3) 34 Ch. D. 227.

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taken by the wife under her father's will was not made by sect. 5 her separate estate so as to come within the exception in the covenant. There, no doubt, the covenant was a joint one by the husband and wife, and not a covenant by the husband alone, as in the present case. But, looking at the reasons given by the Lord Justices in their judgments, it seems to me that it would have made no difference in their decision if the covenant had been by the husband alone, and that I must arrive at a different conclusion from that of Mr. Justice *Chitty* in *In re Queade's Trusts* (1). In the course of his judgment in *In re Whitaker* (2), Lord Justice *Lindley* said (3): "Many questions which arise under the *Married Women's Property Act*, 1882, are well known to be extremely difficult, and I am not satisfied that I understand sect. 19 fully now; but it does not follow that I do not see my way to a short distance and very clearly. I think in this case the actual point we have to decide is clear, and, to my mind, clear to demonstration. Just let us see what the rights of the parties would be but for this Act of Parliament,—not but for any particular section, but if the Act did not exist. There is no controversy at all that if we decide the question apart from this Act of Parliament of 1882, the property would be bound by the covenant to settle. That is unarguable; it is plain." There the Lord Justice was speaking of a covenant by both husband and wife, but, independently of the Act, the law would be the same if the covenant had been by the husband alone, for, as Mr. Justice *Chitty* pointed out in *In re Queade's Trusts* (4), the husband "would have taken the fund in his marital right—that is to say, in right of his wife, it being personalty in possession." Then Lord Justice *Lindley* continued (5): "Now what does the Act say? Sect. 19 says that nothing in this Act shall interfere with or affect any settlement made before marriage or to be made after marriage. What does that mean? It means that you cannot by this Act affect the rights of the parties under the settlement. That seems to me very clear; and, although I do not say I cannot see difficulty in construing sect. 19 with sect. 5, still that does

(1) 33 W. R. 816.
(2) 34 Ch. D. 227.
(3) Ibid. 232.
(4) 33 W. R. 817; 54 L. J. (Ch.) 788.
(5) 34 Ch. D. 233.

not affect this question. The property is bound by the covenant as if the Act had never passed." I may observe in passing that in *In re Queade's Trusts* (1) Mr. Justice *Chitty* put several cases in which he said that, according to the logical result of the argument for the trustees of the settlement, absurd consequences would follow. But in the present case it is just as clear as it was in *In re Whitaker* (2), that the Act cannot affect the rights of the persons who claim under the settlement, and the suggested difficulties do not arise. Then Lord Justice *Lopes*, in giving judgment, said (3): "I do not think there is any serious difficulty in deciding the point which is now before the Court. The testator here did not leave the property in question to the plaintiff for her separate use. Therefore the property in question is not within the exception in the marriage settlement, and was [not] subject to that settlement."

The insertion of the word "not" (above placed in brackets) is evidently a clerical error; the Lord Justice clearly meant to say that the property was not within the exception, and was subject to the settlement. He continued: "The Act of Parliament therefore gives the property in question a character which brings it within the exception. In point of fact it withdraws it from the settlement, and gives to it a different destination from that which it would otherwise have had. But then comes sect. 19. If, as I said, sect. 5 gives the property in question a different destination from that which it would have independent of the Act, it seems to me impossible to say that sect. 19 does not apply." Lord Justice *Cotton*, after referring to the construction of the covenant, said (4): "In my opinion, whatever might otherwise have been the effect of this covenant, sect. 19 prevents sect. 5 of the Act from operating so as to add to the exception contained in the covenant to settle. Under the settlement the property would go to the husband for life, and to the children as in an ordinary settlement. If the contention of Mr. *Farwell* is to prevail, the effect of the provisions contained in sect. 5 would be to withdraw from the settlement this sum, and thereby affect the provisions in favour of the children of the marriage. Does sect. 19 allow that? It says, 'Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman.' To my mind it is impossible to say that, if sect. 5 brings this property within the exception in the covenant, the section will not affect or interfere with the provisions of the settlement. But for the Act of Parliament, it is perfectly clear that this property would not have come within the exception; it would not have been settled to her separate use, nor would it have belonged to the wife for her separate use." And a little further on, after disposing of an argument raised upon sect. 5, he says (1): "I think it" (sect. 19) "must mean that, although this power is given to a married woman by sect. 5, yet it is not intended to interfere in any way with provisions made or to be made in a marriage settlement as to how the woman's property is to be dealt with, and that it prevents sect. 5 adding to the exceptions which are contained in the covenant. In my opinion the decision appealed from is right, and the decision of Mr. Justice *Pearson* in *In re Stonor's Trusts* (2) was right also. It is unnecessary to consider *In re Queade's Trusts* (3), before Mr. Justice *Chitty*, because that particular question does not arise now, and any opinion one might give would be extra-judicial."

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(1) 33 W. R. 817; 54 L. J. (Ch.) 788.
(2) 34 Ch. D. 227.
(3) 34 Ch. D. 233.
(4) Ibid. 231.

In *In re Queade's Trusts* Mr. Justice *Chitty* had said (4): "There are some observations of the learned Judge" (Mr. Justice *Pearson* in *In re Stonor's Trusts*) "which point to the decision being one on the general construction of sects. 5 and 19; . . . . and, if it was intended—which I think it was not—by the learned judge to give the wide and extensive meaning to sect. 19 which the respondents' argument before me would carry, then I should respectfully dissent from the judgment."

I understand Lord Justice *Cotton* to mean that as between these two cases he preferred the decision in *In re Stonor's Trusts*—that, if it was intended to be a decision upon the general construction of sects. 5 and 19, he agreed with it. The decision of the Court of Appeal comes I think to this, that sects. 5 and 19

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(1) 34 Ch. D. 232.
(2) 24 Ch. D. 195.
(3) 33 W. R. 816.
(4) Ibid. 818.

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are to be read together so as to prevent anything being by the operation of sect. 5 taken away from the husband and children which they would have had under the settlement if sect. 5 had not taken it away.

What, then, would but for the Act have been bound by the husband's covenant to settle after-acquired property of the wife? The effect of such a covenant is clearly stated by Sir *George Jessel* in *Dawes* v. *Tredwell* (1). He said: "The covenant, to my mind, is plain, and I consider it clear beyond doubt that the husband has only agreed to do what he has power to do. Now he can do two things. If the property vests in him by law, which is the case with a great deal of personal property, or if he has the power of disposition by law, as in the case of leaseholds, he is to assign it. If it is real estate it vests in the wife, not in him, but he has an interest in it and has a power of concurring with her in conveying, and he is bound to convey his interest and to join with her in conveying the whole property if she is willing to do so, but the covenant does not affect property as to which he has no control whatever." In other words the covenant of the husband affects the property of the wife so far as he has control over it, and he is also bound to concur with her in conveying to the trustees, if she is willing to do so, any other property of hers over which he has no control. In the present case, if the fund in question is bound at all, it is bound by the covenant of the husband. How does the Act affect it? Sects. 5 and 19 taken together prevent the wife from saying that the separate use which is given to her by sect. 5, standing alone, excludes the operation of the covenant in the settlement. The fund, having, as it is admitted, arisen solely from personal estate of the testatrix, is bound by the covenant, and must be transferred to the trustees of the settlement.

One point strongly urged on behalf of the Petitioner was this—that the will of the testatrix was made after the Act came into operation, and that it does not contain any direction that the interests given by it to females shall be for their separate use, because the testatrix knew and relied upon the law as established by sect. 5. But the answer to this argument is obvious. The fund does not belong to the wife for her separate use unless the Act makes it her separate property. If sect. 5 stood alone that would be the effect of the Act, but by the combined operation of sects. 5 and 19 it is not so. The testator's knowledge must be taken to extend to the whole Act, and not to have been limited to one section only. I cannot, therefore, direct the fund to be transferred to the Petitioner.

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(1) 18 Ch. D. 360.

I desire to make one other observation upon Mr. Justice *Chitty's* judgment. He said (1): "It appears to me that the words 'respecting the property of any married woman' (in sect. 19) should properly be read as a settlement or agreement which affects legally or equitably the property, and not merely one that concerns or relates to the property; and as being some settlement or agreement which has a binding force on the property." I entirely agree with that view of the meaning of those words in sect. 19, though I do not see how consistently with it the learned Judge could have arrived at the conclusion at which he did arrive in *In re Queade's Trusts* (2). In the present case I am following the law as it was laid down by the Court of Appeal in *In re Whitaker* (3). The reasons which the Lords Justices gave for their decision shew that it makes no difference that, in the present case, the covenant to settle after-acquired property of the wife was entered into by the husband alone, and not by the husband and wife jointly.

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From this decision the Petitioner appealed. The appeal was heard on the 3rd of March, 1888.

Mulligan, for the Appellant, cited *Ramsden* v. *Smith* (4); *Dawes* v. *Tredwell* (5); *In re Queade's Trusts.*

E. R. Simpson, for the trustees of the settlement, was not called on.

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(1) 33 W. R. 818.
(2) 33 W. R. 816.
(3) 34 Ch. D. 227.
(4) 2 Drew. 298.
(5) 18 Ch. D. 354.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *North*, who held that a share of the personal estate of a testatrix was bound by a covenant in the marriage settlement of the Petitioner and ought not to be paid to her: and the question is, was this decision right?

The covenant in the settlement was undoubtedly the covenant of the husband only: and independently of the *Married Women's Property Act* it would bind all property coming to the wife during the coverture and not settled to her separate use. Then we come to sect. 5 of the *Married Women's Property Act*, 1882: and this property is undoubtedly property to which the title accrued after the commencement of the Act. It is contended that the effect of sect. 5 is to give this property to the wife for her separate use, and consequently it is not property which the husband could settle. If it had been left to her for her separate use it is admitted that it would not have been within the covenant in the settlement; does the Act have the effect of making it property to her separate use so as to prevent it from coming within the covenant? If sect. 5 had been the only section bearing upon the question I agree that the covenant of the husband could not have touched the property, but then we have sect. 19, and the only question is what construction is to be put upon that section. [His Lordship read the section.] Undoubtedly there was a settlement here, and it was respecting the property of this lady, and if we look at the natural meaning of the words of the section, we cannot help saying that it excepts from the Act everything which would interfere with the settlement and would prevent the covenants contained in it from having operation. The 5th section does interfere with this settlement. But for that section the settlement would have given the property to the trustees to be settled for the wife and children, and to say that in the exclusion of this property from the settlement it does not interfere with the settlement is not a construction that can be seriously entertained. It is said that the 19th section is not intended to apply to any settlement except settlements or agreements for settlements by the wife. I do not find that in the words of the Act. It may be a question whether such a settlement as suggested by Mr. Justice *Chitty* in *In re Queade's Trusts* (1) would be within the section. If such a difficulty should arise it is not our affair: we must give the section its fair construction, leaving those who framed it to apply to the Legislature to set it right. All we can say is that the 5th section would interfere with this settlement with respect to the property of this married woman. Married women have derived great benefit from the Act, and they must take the good and the evil together. The true construction is that the 19th section prevents the previous enactment from interfering with any settlement which would have bound the property if the Act had not passed.

We did not express any opinion in *In re Whitaker* (2) on this particular point: we abstained from deciding it then: we did not wish to give an extra-judicial opinion on a case which was not before us. If difficulties should arise on other settlements, that fact would not justify us in putting an unnatural construction on the words of the Act. In my opinion, therefore, the appeal fails, and must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. If we look at the question, as we ought to do, with reference to the position of affairs if there had been no *Married Women's Property Act*, this property in the events which have happened would have been paid to the trustees of the settlement; that would have been the result of the covenant of the husband. Mr. *Mulligan* was right in saying that there was no covenant by the wife, but the after-acquired property of the wife would have been bound by the husband's covenant, apart from the Act, and it would have had to be settled by him. Then we come to the 19th section. It says in plain terms that nothing in the Act should interfere with or affect any settlement or agreement for a settlement respecting the property of a married woman. No doubt this section must be read with some qualification, for if read quite literally the section would exclude its own operation. But if we give it a reasonable construction, it is impossible to say that this document was not a settlement or agree-

(1) 33 W. R. 816; 54 L. J. (Ch.) 786.

(2) 34 Ch. D. 227.

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ment for a settlement within the ordinary meaning of the words, and I cannot see any reason for holding that it was not a settlement or agreement for a settlement within the meaning of this section. I can see that the difficulty suggested by Mr. Justice *Chitty* might arise; but if that puzzle should be brought before us, we must try to solve it. If such a document, as Mr. Justice *Chitty* suggested, should be held to be a settlement or agreement for a settlement, anomalous consequences might arise; but perhaps it would be found that the instrument was made in fraud of the wife and not a settlement at all, and then the difficulty suggested would not arise.

But in this case the agreement is reasonably plain, and I am of opinion that Mr. Justice *North* came to a right conclusion.

BOWEN, L.J.:—

I am of the same opinion. The language of sect. 19 applies to this case. Whatever difficulty may arise as suggested by Mr. Justice *Chitty*, I think it clear that this instrument was a settlement respecting the property of a married woman, and that Mr. Justice *North's* judgment was right. I have nothing to add to what the other Lords Justices have said.

Solicitor for all parties: *W. Horsley.*

M. W.

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[1888 M. 469.]

Companies Clauses Act, 1845 (8 *Vict. c.* 16), *ss.* 9, 10, 45, 63 [*Revised Ed. Statutes, vol. ix., pp.* 566, 572, 576]—*Companies Clauses Act,* 1863 (26 *&* 27 *Vict. c.* 118), *s.* 28 [*Revised Ed. Statutes, vol. xiv., p.* 770]—*Inspection of Registers of Company—Taking Copies—Action by Shareholder in the Interest of a Rival Company.*

The right of inspection and perusal of the register of debenture stockholders, which by sect. 28 of the *Companies Clauses Act,* 1863, is given to mortgagees, bondholders, debenture stockholders, shareholders and stockholders of the company, includes a right to take copies:

The fact that a person has taken his stock in a company at the instance of a rival company, and for the purpose of serving the interests of the rival company, does not disentitle him to the assistance of the Court in enforcing this statutory right:—

Forrest v. *Manchester, Sheffield and Lincolnshire Railway Company* (1), *held* not to apply, inasmuch as that case proceeded on the ground that the plaintiff there purported to sue on behalf of himself and the other shareholders.

Order of *Chitty,* J., affirmed.

THIS was an action commenced on the 8th of February, 1888, to restrain the Defendant company from preventing the Plaintiff from having access at all reasonable times to their register of mortgages and bonds, or their register of debenture stock, for the purpose of inspection and perusal, and from preventing the Plaintiff from taking extracts from those registers of the names, addresses, and holdings of the persons and corporations entitled to such mortgages, bonds and debenture stock.

The Plaintiff, by his affidavit in support of a motion for an injunction, deposed that he was a holder of £200 ordinary stock and £500 debenture stock in the company; that the company had obtained special Acts which had prejudiced the security of the holders of debenture stock, and lessened the value of the ordinary stock, of which he gave two instances; that the company had lately deposited two bills in the Private Bill Office which they intended to promote in the coming session for carrying on further undertakings, and raising capital, the dividends on which were to be a first charge on the company's revenue, and that such bills contained other provisions detrimental to the interest of the share and debenture holders in the company; that the plaintiff proposed, if practicable, to oppose these bills in Parliament; that he was desirous of obtaining the names, addresses and holdings of the persons and corporations entitled to the debenture stock, mortgages and bonds of the company, to enable him to communicate with the holders on the course being pursued by the directors.

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(1) 4 D. F. & J. 126.

The transfer of the £200 stock to the Plaintiff was registered on the 5th of January, 1888, and that of the debenture stock on the 20th of the same month.

The Plaintiff on cross-examination stated that he was "in some way" in the employment of the *Great Eastern Railway Company*, that he had frequently been employed by them as an accountant, and in obtaining signatures to memorials, and, among others, to memorials against the above-mentioned two bills. He admitted that Mr. *Parkes*, the chairman of the *Great Eastern Railway Company*, who was a considerable shareholder in the Defendant company, had given him the £200 ordinary stock for the purpose of qualifying him to attend the meeting of the *Eastern and Midlands Railway Company* on Mr. *Parkes*' behalf. He said he had bought the £500 debenture stock in December, 1887, and had paid for it with money borrowed from Mr. *Fearn*, the solicitor of the *Great Eastern Railway Company*. He said, however, that Mr. *Fearn* was a friend of his, and that he had given Mr. *Fearn* security for the money.

The Defendant company did not refuse to allow the Plaintiff to inspect the register, but informed him that they should not allow him to take copies. The Plaintiff accordingly moved for an injunction, and the application was heard by Mr. Justice *Chitty* on the 17th and 20th of February, 1888.

Romer, Q.C., and *W. Baker*, in support of the motion:—

The Plaintiff as a registered stockholder is entitled to exercise the statutory right of inspecting the registers and taking copies of the entries therein, given to the holders of ordinary and consolidated stock by the *Companies Clauses Act*, 1845, ss. 9, 10, 45 and 63, and extended to the holders of debenture stock by the *Companies Clauses Act*, 1863, s. 28. That right has been recently recognised and affirmed in *Holland* v. *Dickson* (1). And as the right to inspect has been given by the Legislature, that right, in the absence of express prohibition, carries with it the right to take copies.

R. S. Wright, and *Haigh*, for the Defendant company, *contrà* :—

The Court will not interfere at the instance of a Plaintiff who has no *bonâ fide locus standi*, but is the mere nominee of a rival and hostile company, and made a shareholder by them for the express purpose of instituting this litigation in their interests: *Rogers* v. *Oxford, Worcester, and Wolverhampton Railway Company* (2). The action, which is not "faithfully, truthfully, sincerely directed to the benefit and the interests" of the shareholders whom the Plaintiff claims a right to represent, is an imposition on the Court, and no relief ought to be granted therein, at any rate by interlocutory injunction: *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (3); *Seaton* v. *Grant* (4).

[CHITTY, J., referred to *Bloxam* v. *Metropolitan Railway Company* (5): "I cannot say that having chosen to place himself in this invidious position" [consented to become the instrument of others] "with a real interest, though of no great amount, at stake he is not to have the ordinary rights of a plaintiff on account of the motives which led him to acquire the means of appearing in that character:" *per Chelmsford*, L.C.]

Then we submit that the right of inspecting the registers does not give a shareholder the right of taking copies and so publishing to the world, it may be to the detriment of the company, the information thus obtained. The *Companies Clauses Act*, 1845, provides that a "register of shareholders" shall be kept by the company (sect. 9), and in addition to the register of shareholders a "shareholders' address book" which may at all convenient times

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(1) 37 Ch. D. 669.

(2) 2 De G. & J. 662.

(3) 4 D. F. & J. 126.

(4) Law Rep. 2 Ch. 459.

(5) Law Rep. 3 Ch. 337, 354.

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be perused by shareholders gratis, and copies thereof or of any part thereof may be required to be furnished on payment (sect. 10). Sects. 45 and 63, as to the registers of mortgages and bonds and of holders of consolidated stock, which are to be accessible at all reasonable times, and the similar provision in the *Companies Clauses Act*, 1863, sect. 28, that a register of debenture stock shall be kept and shall be accessible for inspection and perusal at all reasonable times, contain no such provision as in the case of the address book; and it is therefore submitted that it was not intended that shareholders should have the right of taking or requiring copies to be taken of anything but the addresses of the shareholders. Although "inspection" in an action gives the right of taking copies, that is by ancient practice, which has no application to the case of a shareholder whose rights are defined and limited by statute.

Romer, in reply:—

The Court cannot go behind the register, on which the Plaintiff is entered as the holder of ordinary and debenture stock, to inquire how, or for what purpose, his holding was acquired.

[He was stopped.]

CHITTY, J.:—

This motion is resisted on two grounds; one being, in substance, that the Plaintiff is not, what is termed, a *bonâ fide* stockholder or debenture holder. In the first place he holds the stock in his own name, and he is on the register. Secondly, he holds the debenture stock in his own name, and he is on the register, and *primâ facie* he has a right to see it. The result of the authorities I think now is clear that whatever the Court or Judge individually may think of the merits of the Applicant, he cannot be denied the rights which the Legislature has conferred upon him as the holder of stock. The Court may see that the man, though he bought the stock nominally in his own interest, has really taken it in the interest of some other person. But as the company is not bound by any such trust, but can only look, and must look, to the register, for the purpose of the liabilities, this applies to the rights of the stockholder himself. The point was very neatly

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treated in *Pender* v. *Lushington* (1). There the holders of the stock in one company proposed to give their votes in a manner which was rightly considered, as far as the facts were before the Court, to be detrimental to the interests of that company, and it was shewn that many of them had bought their stock in the interest of a rival company, and that their object in buying the stock was to get a majority at the meeting which was held. In these circumstances the chairman considered he was entitled to go behind the register and decline the votes, inasmuch as they were given, not in the interests of the company whose meeting was then being held, but in the interest of some other company. The Master of the Rolls decided that for all purposes of voting the register was final, and so, it appears to me, it is for all purposes of the rights of the stockholder as between himself on the one hand and the company on the other. There have been cases in regard to the shareholder being, what was termed, not a *bonâ fide* holder, and the strongest case in support of the Defendant company's contention is *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2), but since that case many others of equal authority have been decided, and the result to my mind is that notwithstanding the shareholder may have been put up by some rival company to take the stock, and may have bought the stock for the very purpose of bringing an action, he is entitled, irrespectively of how he acquired the stock, to have his right enforced. That is the effect of *Bloxam* v. *Metropolitan Railway Company* (3).

In this case I have no hesitation in saying that the Plaintiff took his stock of both classes at the suggestion and in the interest of the *Great Eastern Railway Company*, or Mr. *Parkes* the chairman, a large holder of stock in that company. I think he is acting to a large extent in the interest of the *Great Eastern Railway Company*, but it appears to me on the authorities that I am not justified in going behind the register. Even if I came to the conclusion that I did not like the position of the Plaintiff in this particular matter, I should have no right to refuse to do him justice or accord him the rights which the Legislature has given him. The argument therefore as to "personal exception" to the Plaintiff fails.

(1) 6 Ch. D. 70. (2) 4 D. F. & J. 126. (3) Law Rep. 3 Ch. 337.

Then comes the narrower question on the construction of the Act. The Plaintiff desires to inspect the register, and plainly he has that right under the Acts of 1845 and 1863. He is entitled, as was properly admitted, and as I recently decided (in *Holland* v. *Dickson* (1)), to see not only that particular part of the register which relates to himself, but the whole of the register, and to see every part of it; for instance, the amount of stock standing in the names of the other stockholders; the object of the Act plainly being that every stockholder should be able to see the register not merely so far as it relates to himself, but with reference to his co-shareholders or co-stockholders, in order, as I take it, that he might, if he thought fit, have communication with them. Unquestionably, as a matter of fact, directors of a company are not disposed to allow stockholders too much inspection, when there is a question about to be decided at a general meeting; while the directors have the advantage of being able, themselves or by their officers, to refer to the register and send out circulars and canvass all the stockholders. These sections, I think, were intended to put the stockholders in a similar position, that is to say, that each stockholder might see who were entitled to the stock of which he held a part and what interest they had. I see nothing unlawful in a man holding stock desiring to inspect the register for the purpose of communicating with those who stand in a similar position, and, if he can honestly do it, obtaining their assent to any motion, amendment, or resolution to be brought before any general meeting of the company.

Then a further point has been taken as to the right to take copies. The *Companies Clauses Act*, 1845, requires, first, that a register of shares shall be kept (sect. 9), and also that a shareholders' address book shall be kept (sect. 10), and then at the end of sect. 10 it is enacted that any shareholder may at all convenient times peruse the (address) book gratis, and may require a copy thereof or of any part thereof, and a sum is to be paid for the copies. Sect. 45, which requires a register of mortgages to be kept, enacts merely that the register may be perused at all reasonable times by any of the shareholders, or by any mortgagee, &c., without fee, and is silent with regard to copies. The result therefore is that in one case, and one case only, the company are bound to furnish copies and may take a fee—that is the case mentioned in sect. 10. In regard to the other right, according to the mere words of the enactment, it is a right to inspect, and to inspect only, but there is no prohibition on the shareholder, during the time that he makes his inspection, making notes of that which he inspects. As was said, he might, if he could, commit the whole register to memory. That of course would be a difficult thing to do. But there is nothing in the Act which prevents his making a note, and if he may make a note, I do not see why he may not make a complete note of any particular part: in other words, why he may not make an extract, and from that it seems to follow that he may make a reasonable use of the inspection and take a copy. So far from the provision of sect. 10 being in favour of Mr. *Wright's* argument it appears to me to be against him, because that section alone, applied to a particular case, imposes on the company a liability to give a copy, and the company are not under any liability to give copies under the other section. The silence of the Legislature as to taking copies appears to me to be immaterial.

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(1) 37 Ch. D. 669.

I think that when a man is inspecting, he may make *bonâ fide* use of his inspection, and it follows from his right to inspect that he can make copies. I should be very sorry, because there may be some personal exception to the Plaintiff in this case, to decide otherwise, as, if I did, I should be doing, as it seems to me, a great wrong to other shareholders in other companies against whom no such exceptions as those which have been here put forward could be taken.

F. G. A. W.

C. A. The company appealed from this decision. The appeal was heard on the 22nd of February, 1888.

R. S. Wright, and *Haigh*, for the appeal:—

We contend that whatever the Plaintiff's legal right may be, a Court of Equity will not assist him, inasmuch as he is a puppet in the hands of others, and has come for an injunction on a misrepresentation, professing to come in his own interest as a stockholder, whereas he is really seeking relief on behalf of a rival company. We contend, moreover, that his legal right is only to inspect, not to take copies.

The legal right, which is the most important question, depends on the statutes. The *Companies Clauses Act*, 1845 (8 Vict. c. 16) by sect. 9 provides that a register of shareholders shall be kept, saying nothing about any right to inspect it. Sect. 10 provides for a shareholders' address-book, and gives every shareholder a right to peruse it, and to require the company to furnish him with copies at a certain rate. Sect. 36 enables a person who has obtained execution as therein mentioned against any shareholders to inspect the register of shareholders, but says nothing about copies. Sect. 45 provides for a register of mortgages and bonds, and gives a right to any shareholder, mortgagee or bond-creditor to peruse it, saying nothing about copies. Sect. 119 obliges the book-keeper to permit shareholders to inspect the books of account and to take copies or extracts, shewing that where the Legislature meant to give a right to copy it said so. The register of debenture stock is provided for by the *Companies Clauses Act*, 1863 (26 & 27 Vict. c. 118), sect. 28, and that section provides that every mortgagee, bondholder, debenture stockholder, shareholder and stockholder, may peruse and inspect, but says nothing about taking copies. A right to inspect has indeed generally been understood to include a right to take copies, but in the clauses of these Acts there is a variation of expression which cannot have been unintentional. The argument in the Court below was that if a man has a good memory he may go outside and write down the result of his perusal, but it is no argument in law for a man's right to do a thing that he can get the same result by other means. Then we say that there is no right even to inspection unless it is required for a reasonable purpose: *Reg.* v. *London and St. Katharine's Dock Company* (1).

[BOWEN, L.J.:—That was an application for a prerogative writ of mandamus, which may make a difference. There is a discretion as to granting such a writ.]

So there is as to granting injunctions, which brings us to the other branch of the case. Here the application to inspect is not *bonâ fide*, but is made in the interests of a rival company by a person who is the puppet of that company, and in such a case a Court of Equity will not interfere to help the applicant: *Rogers* v. *Oxford, Worcester, and Wolverhampton Railway Company* (1); *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (2). In *Hattersley* v. *Earl Shelburne* (3) the principle was recognised, though it was not applied, as it was not there shewn that the plaintiff was a puppet not acting on his own account, and the badness of his motives was not a ground for taking away his rights. *Seaton* v. *Grant* (4) goes on similar grounds. Mr. Justice *Chitty* considered that *Bloxam* v. *Metropolitan Railway Company* (5) overruled the earlier cases, but it does not really make against us. We do not contend that the Plaintiff is debarred from seeking help to enforce his rights because he bought stock in order to enable him to take proceedings, but because he is the puppet of a rival company and acting in their interest.

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(1) 31 L. T. (N.S.) 588.

Romer, Q.C., and *W. Baker*, *contrà*:—

[COTTON, L.J.:—How do you make out your right to copy as well as to inspect? This is not an inspection for the purposes of an action.]

We say that the object of the provisions in the Acts was to give shareholders or stockholders the same facilities for communicating with their fellow shareholders or stockholders as the directors have, and this object is furthered by a right to take copies. A person who inspects may, if he has a good memory, go out and write down what he has read, he could not be prevented from doing this, and it is an arbitrary thing if a stockholder who clearly can do this is to be prevented from taking a note in the office. The question turns on sect. 28 of the later Act. It is ordered that a register of debenture stockholders should be kept, evidently for the purpose of enabling the company to communicate with them. The right of inspection is given that shareholders may be able to communicate with them

(1) 2 De G. & J. 662, 674.
(2) 4 D. F. & J. 126.
(3) 31 L. J. (Ch.) 873.
(4) Law Rep. 2 Ch. 459.
(5) Law Rep. 3 Ch. 337.

and they with each other. If they may not copy as well as inspect, a body opposed to the policy of the directors would be placed at an unfair disadvantage, for the directors can copy at any time. If there is an unlimited right of inspection why should the inspecting party not be allowed to copy, we are not asking the company to furnish copies. A general right to inspect carries with it a right to take notes, and the Court is asked to infer that this right is taken away because one section of the earlier Act requires the company to furnish copies and the others say nothing about copies.

[LINDLEY, L.J.:—Sect. 119 is most in your way, for it gives authority to "take copies."]

There were special reasons for giving authority in that case; the right to inspect was not unlimited, it was exercisable only during certain periods, and it was necessary to define the duties of the book-keeper. Moreover, the section imposes a penalty which makes it necessary to be more particular in defining the right. If a shareholder may copy accounts, it is a strange thing if he may not copy stockholders' addresses. The general principle that a right to inspect carries with it the right to take copies is strongly laid down in *Coleman* v. *West Hartlepool Harbour and Railway Company* (1), and *Pratt* v. *Pratt* (2). Why should advantage be given to a person with a strong memory?

[LINDLEY, L.J.:—I am more influenced by the consideration that the exercise of a right to copy might cause the office to be blocked up all day.]

That would be met by the words "at all reasonable times." It never has occurred to any company until now to dispute the right to copy.

Now as to what I may call the question of prejudice—that the Plaintiff is a puppet not acting in respect of his own interests.

[COTTON, L.J.:—I think that the cases cited against you do not apply. A person there professed to be suing on behalf of the other shareholders as well as himself.]

That is so, and even in those cases the objection has not generally prevailed: *Colman* v. *Eastern Counties Railway Com-*

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(1) 5 L. T. (N.S.) 266.

(2) 30 W. R. 837.

pany (1). The principle laid down in *Pender* v. *Lushington* (2), that a party does not lose his legal rights because he is exercising them from a bad motive, applies here. The only case in which an objection of this nature has been held fatal is *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (3), and the decision in fact went upon the principle that the suit was a sham. *Seaton* v. *Grant* (4) and *Bloxam* v. *Metropolitan Railway Company* (5) are strong in our favour.

R. S. Wright, in reply:—

I submit that on the construction of sect. 28 of the later Act we are right. The words "for inspection and perusal" limit the right, if more had been intended those words would have been omitted, and it would have been said merely that the register should be accessible. The cases cited on the other side go on the meaning of an order made by the Court for inspection, which is a different matter. [*Chitty's* Practice (6), "Inspection of Documents," and *Bacon's* Abridg. "Evidence," were also referred to]. 32 Geo. 3, c. 58, s. 4, refers expressly to taking copies.

[BOWEN, L.J.:—Does a right of inspection at common law include a right to take copies? *Rex* v. *Fraternity of Hostmen in Newcastle-on-Tyne* (7).]

Probably in general it does, as taking copies would generally further the objects for which inspection is given. A person who had a right to inspect has been refused inspection where he wanted it for the benefit of some one else: *Rex* v. *Antrobus* (8). Here the Plaintiff is asking for a right which is not given in terms, and what the Court is asked to do is to imply a right in favour of a person who is claiming to exercise it for the benefit of a rival company.

1888. March 6. LINDLEY, L.J.:—

This is an appeal by the Defendants from an order made by Mr. Justice *Chitty* restraining them from preventing the Plaintiff,

(1) 10 Beav. 1.
(2) 6 Ch. D. 70.
(3) 4 D. F. & J. 126.
(4) Law Rep. 2 Ch. 459.
(5) Law Rep. 3 Ch. 337.
(6) Vol. iii. p. 364, s. 2.
(7) 2 Str. 1223.
(8) 2 Ad. & E. 789

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Mr. *Mutter*, from taking copies of their register of debenture stockholders. Mr. *Mutter* is a stockholder to the extent of £200 in the Defendant company, and he is also a debenture stockholder, and he claims the right not only to inspect but to take copies of the register of debenture stockholders under the provision in the 28th section of the *Companies Clauses Act*, 1863, which runs thus:—

"The company shall cause entries of the debenture stock from time to time created to be made in a register to be kept for that purpose, wherein they shall enter the names and addresses of the several persons and corporations from time to time entitled to the debenture stock, with the respective amounts of the stock to which they are respectively entitled; and the register shall be accessible for inspection and perusal at all reasonable times to every mortgagee, bondholder, debenture stockholder, shareholder, and stockholder of the company, without the payment of any fee or charge."

Mr. *Mutter*, on presenting himself at the office of the Defendant company for the purpose of inspecting the register was told that he was at liberty to inspect, and it was produced to him, but when he sought to take extracts or copies he was refused leave to do so on the ground that the section did not authorize him, or, at all events, did not compel the company to allow him, to do so. Thereupon he instituted this action, and Mr. Justice *Chitty* decided that he was entitled to take copies of the debenture stock register, and from that order the company appeals.

The company raised several points, the most important of which was that he had no right under that section to take copies. Another point equally important to him, but of less general interest, was that if he had such a right this was not a case in which the Court would grant him any assistance by way of injunction. It will be convenient to dispose of the second point first. The grounds on which it was urged that this was not a case in which the Court would interfere on the Plaintiff's behalf were two; first it was said that he was not really a *bonâ fide* shareholder or debenture stockholder, but that he was merely a nominee of a rival company, viz., the *Great Eastern*; and secondly, it was said that there was such a want of candour in his affidavit, which was exposed on cross-examination, that he personally was not one in whose favour the Court ought to interfere. Now the fact that he has taken both the shares and the debenture stock at the instance of the *Great Eastern Railway Company* is made out by the cross-examination, but at the same time he is unquestionably in point of law both a shareholder and a debenture stockholder; he therefore has the rights, whatever they may be, of a shareholder and a debenture stockholder, and whether he is trustee for other people we cannot inquire. I agree with Mr. Justice *Chitty* in thinking that the Plaintiff is not on that ground debarred from insisting on his legal rights. The authorities relied upon by Mr. *Wright* for this purpose, of which *Forrest* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1) was the leading case, do not go the length for which he contended. Those were cases in which a nominee of a rival company not only had taken shares for the purposes of a rival company, but assumed to have a common interest with all the other shareholders, and to represent them in a suit which he instituted in his own name on behalf of himself and them. It has been held that in a suit of that kind, if a person does not really represent the interest of those whom he purports to represent, exception may be taken to him personally, and relief be denied him which would be afforded if it were true that he represented those whom he affects to represent in that form of action. This is not a case of that kind. The Plaintiff does not come forward here as representing any other shareholders. This is not an action on behalf of himself and others, it is an action brought by him in his own personal interest, and does not profess to be anything else. That class of cases therefore does not touch this, nor am I aware of any case which warrants Mr. *Wright's* contention.

Then as regards the affidavits and the cross-examination I think it is established that there was a want of candour in the Plaintiff's affidavit, but I do not think that he has been guilty of any such misrepresentation or deceit as to disentitle him to the relief to which he would otherwise be entitled.

I come now to the substantial question whether he is entitled to take copies of this debenture register. The question thus raised is one of considerable importance to companies and shareholders generally, and we therefore considered it desirable to look into the authorities before giving our judgment. The result of my own researches is negative rather than positive. I have not been able to find a single case either at law or in equity in which the Court has ever held that a person having a right to inspect a document has not also a right to take a copy of it, or of so much of it as he requires for some legitimate purpose. The right to take a copy is treated as incidental to the right to inspect, and the common form of orders to inspect is to inspect and take copies. This seems to be the common form at law when a mandamus is granted, and when an order is made on a motion in a pending action, and this is, and, so far as I have been able to discover, always has been, the common form of an order to inspect when made in Chancery. A great number of cases on this subject will be found collected in the well-known note to *Rex* v. *Fraternity of Hostmen in Newcastle-upon-Tyne* (1) and in *Chitty's Archbold* (2); and an examination of these and other authorities has led me to the conclusion that, speaking generally, a right to take copies is always treated as incidental to a right to inspect. (See also *Browning* v. *Aylwin* (3); *Rex* v. *Lucas* (4); *Rex* v. *Merchant Tailors' Company* (5); *In re Burton and The Saddlers' Company* (6).) I say speaking generally, because I have found an instance of a special Act relating to a company in which a right to inspect has been granted, but a right to take copies has been expressly excluded. One of the Acts relating to the River *Dee* Improvement Commissioners contains such a clause. Again, there may be cases in which the inspection of a document is all that can be reasonably required for any legitimate purpose; or a document which a man may have a right to inspect may be in such a dilapidated state as to render it impossible to take a copy of it without destroying it or at least seriously injuring it.

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(1) 4 D. F. & J. 126.

Again, a person may have a right to inspect the whole of a book or document in order to find out what part of it really concerns him, and his right to inspect may therefore extend to much more than he has a right to take a copy of.

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(1) 2 Str. 1223.

(2) 14th Ed. vol. i. p. 511.

(3) 7 B. & C. 204.

(4) 10 East, 235.

(5) 2 B. & Ad. 115.

(6) 31 L. J. (Q.B.) 62, 65.

When the right to inspect and take a copy is expressly conferred by statute the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred the extent of such right depends on the interest which the applicant has in what he wants to copy, and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle, as is shewn by the judgment in *Rex* v. *Justices of Staffordshire* (1); so is the common law right of the member of a corporation to inspect and take copies of the documents of the corporation: *Rex* v. *Merchant Tailors' Company* (2).

Bearing in mind these principles it is necessary to turn to the statute on which the Plaintiff relies, and to see what right it confers upon him. The section which gives him the right to inspect is silent on the subject of taking copies. There is, however, a section relating to another matter in the *Companies Clauses Act*, 1845, viz., sect. 119, which expressly gives a right to take copies as well as a right to inspect. But this section imposes a penalty, and as it was intended to impose a penalty not only in the case of a refusal to allow inspection, but also in the case of a refusal to allow a copy to be taken, it was necessary to say so in express words, and to mention both inspection and taking copies. The fact, therefore, that both are mentioned in this section, whilst inspection only is mentioned in sect. 28 of the Act of 1863, does not shew that in framing this last section a right to take copies was intended to be excluded.

Sect. 36 of the Act of 1845, which enables judgment creditors of the company to inspect the register of shareholders, would be practically useless if it were construed strictly, and so as not to include a right to take copies. A judgment creditor of a company who cannot get paid by the company is entitled to sue all the shareholders in it whose shares are not paid up, and for this purpose he must have their names and addresses, and it is idle to suppose that the right of inspection here given does not include a right to take a copy.

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(1) 6 Ad. & E. 84 (see pp. 99–101).

(2) 2 B. & Ad. 115.

Similar observations apply, though less forcibly, to sect. 45 of the Act of 1845 and sect. 28 of the Act of 1863. But it is obvious that a shareholder or debenture stockholder may desire to consult the whole of the debenture stockholders on some matter which concerns them all, and it is reasonable to suppose that the right to inspect the debenture stock register is conferred to enable him to do this as well as for other purposes. Parliament having conferred the right to inspect, the Court ought not so to construe the statute as to render the right conferred illusory, and if the Court were to hold that in such a case as the present the right to inspect existed but the right to take copies did not, the Court would in effect be rendering the statute of no avail.

Upon the ground therefore that in this case the right to take a copy cannot be denied without rendering the right to inspect practically useless, I am of opinion that the order appealed from was correct, and that this appeal must be dismissed with costs.

COTTON, L.J.:—

The judgment delivered by Lord Justice *Lindley*, though expressed in the singular, may be taken as the judgment of the Court.

BOWEN, L.J., concurred.

Solicitor for Plaintiff: *Valentine.*
Solicitors for Company: *F. C. Mathews & Browne.*

H. C. J.

C. A.
1888
March 7.

In re KNIGHT.
KNIGHT *v.* GARDNER.

[1879 K. 30.]

Practice—Security for Costs—Executor—Set-off.

In an administration action *P.* was found to be heir-at-law. *K.*, who claimed to be heir, appealed against this decision. *P.* then died, and *K.* revived against *H.*, his executor and devisee in trust. *H.* applied for security for the costs of the appeal on the ground of *K.'s* proved insolvency. *K.* resisted on the ground that *P.* had been ordered to pay to him the costs of a previous appeal, which were of sufficient amount to be a security:—

Held, that if *P.* had been the respondent this would have been a sufficient answer, but that *H.* being only a representative was entitled to be indemnified, and that security must be given.

THIS was an action to carry into execution the trusts of the will of *Edward Knight*. Judgment was given on the 3rd of May, 1879, and an inquiry was directed who was the testator's heir-at-law. The Chief Clerk by his certificate found that *Richard Knight* was heir-at-law.

John Sutton Page, a person having liberty to attend, applied to vary the certificate in this respect. On the 19th of July, 1887, an order was made on further consideration and on the above application, and the certificate was varied by finding that *John Page*, since deceased, was the testator's heir-at-law, and that, subject to the dower of any widow of *John Page*, *John Sutton Page* was by descent entitled to all real estate as to which the testator died intestate.

Richard Knight, on the 2nd of November, 1887, gave notice of appeal from this decision. *John Sutton Page* died on the 17th leaving a will of which *J. E. Hullett* was devisee in trust and executor. The Appellant served on *Hullett* an order of revivor on the 1st of March, 1888.

Hullett now applied for security for the costs of the appeal to the amount of £60, on the ground of the insolvency of the Appellant, the evidence of which was ample.

By an order of the Court of Appeal dated the 12th of December, 1883, made on appeal from an order of the 30th of July, 1883, in this action, *J. S. Page* had been ordered to pay to *Knight* his costs of that appeal. A clerk of *Knight's* solicitors deposed that those costs amounted to nearly £40, and remained unpaid.

Eyre, for the application.

Methold, contrà :—

There is no occasion for security for costs, as the estate of *Page* already owes *Knight* an amount of costs amply sufficient to secure the costs of the appeal. If the appeal should be dismissed with costs there will be a set-off.

COTTON, L.J. :—

It is contended that security for costs ought not to be ordered in this case because if the appeal is unsuccessful the costs can be set off against the costs of a previous appeal which *Page* was ordered to pay to the present Appellant, and which are sufficient in amount to secure the costs of the present appeal. If *Page* himself were the respondent that would be a sufficient answer to the application, but it is his executor who is Respondent in the present appeal, and I think that he is entitled to be indemnified against the costs of it. I think that £30 will be the proper amount.

LINDLEY and BOWEN, L.JJ., concurred.

Solicitors for Applicant: *G. L. P. Eyre & Co.*, agents for *W. Langley-Smith, Gloucester.*

Solicitors for *Knight*: *Jennings, Son & Burton.*

H. C. J.

C. A.
1888
March 7.

MILLAR *v.* HARPER.

[1886 M. 4060.]

Practice—Particulars of Demand—Discovery.

Where the defendant has means of knowing the facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he has given discovery.

The Plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been taken of the goods in the Defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand shewing which chattels they claimed:—

Held (affirming *North*, J.), that the application ought to stand over till the husband had made an affidavit which of the articles belonged to the wife.

THE Plaintiffs were the executors of *Julia Harper*, the deceased wife of the Defendant. The statement of claim, delivered on the 5th of March, 1887, alleged that when Mrs. *Harper* married the Defendant in 1870 she was entitled to various chattels which under the settlement then made remained her separate estate; that during her coverture she was entitled to a considerable income for her separate use, and bought by means of it various other chattels which remained her separate estate; that she brought all the chattels into the house where she resided, and to which she was entitled to her separate use; that she died on the 22nd of April, 1886, leaving a will, of which the Plaintiffs were the executors, by which she disposed of her separate estate; that the Defendant wrongfully retained the chattels and refused to give them up. The Plaintiffs claimed a declaration that the furniture, pictures, horse, carriages, and other effects in the possession of the Defendant comprised in the settlement or purchased by *Julia Harper* with her separate estate belonged to her for her separate use, and now formed part of her estate; a declaration that the Plaintiffs as her executors were entitled to them; damages; a receiver; and further relief.

On the 15th of March, 1887, the Defendant took out a summons requiring the Plaintiffs within seven days to deliver to the

Defendant's solicitors full particulars shewing the nature and description of the several articles of furniture, pictures, carriages, and other effects, and also the name and description of the horse respectively mentioned or referred to in the statement of claim, and which the Plaintiffs alleged to have belonged to *Julia Harper* for her separate use, together with dates and items shewing when and of whom the purchases alleged by the statement of claim to have been made were respectively made, and what articles were so purchased, and what price or prices was or were paid for the same by *Julia Harper*, and that unless such particulars were delivered within seven days that all further proceedings might be stayed until the delivery thereof, and that the Defendant might have twenty-one days to deliver his statement of defence after the delivery of the particulars.

In May, 1886, the Plaintiffs had taken an inventory of the furniture and other articles in the house.

The Chief Clerk proposed to make an order according to the terms of the summons, but the case was adjourned into Court, and on the 10th of November, 1887, Mr. Justice *North* directed the application to stand over until the Defendant had made an affidavit which of the articles comprised in the inventory of May, 1886, were included in the marriage settlement, and also stating what other articles in the inventory were admitted by him to be the property of the Plaintiffs.

The Defendant did not make the affidavit, but renewed his application before Mr. Justice *North*, who on the 16th of January, 1888, refused it with costs. The Defendant appealed.

J. G. Wood, for the appeal.

Swinfen Eady, for the Respondents, was not called upon.

COTTON, L.J.:—

I am of opinion that this appeal is wrong. The Defendant must know of his own knowledge what furniture his wife had, the Plaintiffs, being only executors, cannot be supposed to have any such knowledge. The Plaintiffs put forward by their statement of claim a right to a certain class of articles, but cannot identify them. It may be right that before trial they should give particulars, but I think that their giving them ought to be postponed till the Defendant has given discovery. Where the Plaintiffs are executors who do not know, and the Defendant a person who does know, it is right that discovery should come first.

LINDLEY, L.J.:—

I think that the order appealed from is quite right. Any other order under the existing circumstances would make it impossible for the action to go on.

BOWEN, L.J.:—

I am of the same opinion. It is good practice and good sense that where the Defendant knows the facts and the Plaintiffs do not, the Defendant should give discovery before the Plaintiffs deliver particulars.

Solicitors for Plaintiffs: *S. F. Miller & Son.*
Solicitors for Defendant: *Peacock & Goddard.*

H. C. J.

C. A.
1888
March 8, 10.

In re YATES.
BATCHELDOR *v.* YATES.

Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 5, 7 [*Revised Ed. Statutes, vol. xviii., p.* 651–653]—*Trade Machinery—Mortgage of Land not mentioning Fixtures—Power of Sale—Conveyancing and Law of Property Act*, 1881, *s.* 19.

The owner of land and buildings which he used for the purposes of his business, and in which there was fixed machinery belonging to him, being "trade machinery" within the meaning of the *Bills of Sale Act*, 1878, mortgaged them in fee without any general words or any reference to fixtures or machinery. By the mortgage deed it was agreed that the powers in sect. 19 of the *Conveyancing and Law of Property Act*, 1881, should be exercisable without such notice as required by the Act. After the death of the mortgagor, his creditors insisted that this mortgage was void both as to the freehold and as to the trade machinery, under the *Bills of Sale Acts*, 1878 and 1882. The Vice-Chancellor of the County Palatine held it valid as to both. On appeal, the argument that it was void as to the freehold, was abandoned, on the authority of *In re Burdett* (1):—

Held, that the mortgage was not an assignment of the trade machinery, since the trade machinery only passed by virtue of being affixed to the freehold, and that the deed did not, apart from the power of sale, give a power to seize or take possession of the trade machinery as chattels, since the mortgagee could only take possession of them by taking possession of the freehold:

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(1) 20 Q. B. D. 310.

Held, also, that the power of sale did not authorize the mortgagee to sell the trade machinery apart from the freehold:

Held, therefore, that the instrument was not a bill of sale within the meaning of the Acts, and gave a valid security on the trade machinery.

BY indenture dated the 16th of August, 1886, made between *Hugh Yates* of the one part, and *Rosalie C. Frost* (a married woman), of the other part, containing no recitals, *Yates*, in consideration of £950 paid by Mrs. *Frost* to him out of her separate estate, covenanted to pay to her on the 7th of February then next the sum of £950 with interest thereon at £5 per cent. per annum from the 7th of August, 1886, and also, so long after that day as any principal money remained due, to pay to her interest thereon at the same rate by equal half-yearly payments on the 7th of August and the 7th of February. By a further witnessing part *Yates*, "as beneficial owner," granted and conveyed to the mortgagee "All that piece of land with the dwelling-house and buildings thereon erected situate in *Everton*, in the city of *Liverpool*, and on the north side of the road leading from *Liverpool* aforesaid to the village of *Everton* aforesaid, now called *Everton Brow*, measuring" [here followed dimensions and boundaries], "which said piece of land, messuage, and hereditaments form part of a line or row called *Everton Crescent*, and is now numbered 17, *Everton Crescent*, aforesaid, To hold the same unto and to the use of the mortgagee in fee simple." Then followed a proviso for re-conveyance on payment of principal and interest on the 7th of February then next. *Yates* covenanted with the mortgagee that he would during the continuance of the security "keep the buildings comprised herein" in good and substantial repair and insured against fire, in the sum of £950 at least, in an office approved by the mortgagee, and on demand deliver up the policy and the receipts for premiums. It was agreed that the powers contained in sect. 19 of the *Conveyancing and Law of Property Act*, 1881, should be exercisable at any time after the 7th of February then next, without its being necessary to serve the

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notice required by sect. 20 of the Act, and that as fully and effectually as if such notice had been served, and as if default had been made in payment of the mortgage money or some part thereof for three months after such service. And it was provided that sect. 17 and sect. 18, sub-sect. 1, of the Act should not apply.

The land measured about seventy yards by thirty-seven feet, it had upon it a house and workshop, and part was used as a yard.

In January, 1887, *Yates* died. Proceedings were shortly afterwards taken in the Chancery of the County Palatine by creditors for the administration of his estate, and an order for administration was made, and on the 29th of April, 1887, a receiver was appointed, who entered into possession of the mortgaged property.

The mortgagor was a stonemason and general contractor, and the mortgaged property was part of the premises on which he carried on his business. Upon the mortgaged property was a considerable amount of trade fixtures coming within the description of "trade machinery" as defined by the *Bills of Sale Act*, 1878, sect. 5.

Soon after the appointment of the receiver, Mrs. *Frost* pressed for payment of her interest, and an understanding was come to that the receiver should become quarterly tenant to her at the yearly rent of £56. On the 17th of June, 1887, he gave notice to determine this tenancy on or before the 4th of October then next. He paid her two quarters' rent.

On the 4th of October, 1887, Mrs. *Frost*, in exercise of her power of sale, conveyed the mortgaged property to Mr. *Bridge* in fee by the same description as that contained in the mortgage deed. The trade machinery had not to any great extent been interfered with. On the 5th of October the purchaser applied to the receiver to give up possession to him. The receiver, being advised that the mortgage was invalid under the *Bills of Sale Acts*, declined to do so, and Mr. *Bridge* thereupon applied to the Palatine Court to order him to give up possession.

The Vice-Chancellor held that the mortgage was not a bill of sale within the Acts, and made an order directing the receiver to give up possession and to pay to Mr. *Bridge* a sum by way of occupation rent from the 3rd of October, 1887, and also the proceeds of such parts of the property comprised in the mortgage as had been sold by the receiver since that day.

The Plaintiffs and the receiver appealed from this order. The appeal was argued on the 12th of January, 1888, and judgment was reserved; but on the 8th of March it was restored to the paper to be re-argued before a Court differently constituted, in order that the effect of the power of sale might be fully considered.

Cozens-Hardy, Q.C., and *Arkle*, for the Appellants:—

Since this case was argued on the former occasion the case of *In re Burdett* (1) has been decided by the other branch of the Court of Appeal, and after that decision we can no longer argue that this mortgage is invalid as regards the freehold, but we contend that it is bad as regards the trade machinery. The *Bills of Sale Act*, 1882, s. 9, makes void any bill of sale of personal chattels which is not made in accordance with the statutory form. This, we say, is a bill of sale of the trade machinery, which are personal chattels, and is therefore void as to them.

First, these are personal chattels. The *Bills of Sale Act*, 1878, s. 4, defines personal chattels, and includes in them fixtures when separately assigned, but excludes fixtures (except trade machinery) when assigned together with a freehold or leasehold interest in the land or building to which they are affixed. Then sect. 5 enacts that trade machinery shall for the purposes of the Act be deemed to be personal chattels. Sect. 7 provides that fixtures shall not be deemed to be separately assigned by reason only that they are assigned by separate words. The result is that ordinary fixtures are chattels for the purposes of the Act only when they are separately assigned, but there is nothing to take away the effect of the words making trade machinery chattels whether separately assigned or not.

Then what is a bill of sale? Sect. 3 says that the term shall include every bill of sale by which the grantee has power to seize or take possession of personal chattels. Sect. 4 provides that "bill of sale" shall include "bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-money of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred," and it then goes on to exclude assignments for the benefit of creditors, marriage settlements, and certain other instruments. Then sect. 5 provides that any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels, shall be deemed a bill of sale within the meaning of the Act. Now the words of sect. 4 are very wide, and include every instrument giving power to take possession of personal chattels as security for any debt, with the exceptions mentioned in the latter part of the clause. Under sect. 5 you must see whether the instrument which gives power to seize or take possession of the trade machinery is one which, if dealing with ordinary chattels, would come within any of the exceptions of sect. 4, if it would not it is a bill of sale. How can this mortgagee escape from sects. 3 and 4? He has no title but this mortgage deed which gives him power to seize and take possession of the machinery.

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(1) 20 Q. B. D. 310.

It has been contended that the Legislature cannot be supposed to have intended to alter the general law as to fixtures passing with the land, but this is not to be assumed. The Act was intended to alter the law as to fixtures in various particulars. Thus it did away with the doctrine in *Ex parte Daglish* (1). In *Ex parte Barclay* (2) it was said that the test whether registration was required was whether the instrument gave the mortgagee power to deal with the fixtures separately. In *Hawtry* v. *Butlin* (3) the instrument was held to require registration though a leasehold interest was assigned along with the fixtures. But these cases were under the Act of 1854, which has never been held to apply to any but fixtures of a lessee in which he has an interest apart from his interest in the land. That is not the case under the present Act, which makes trade machinery personal chattels for all the purposes of the Act.

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(1) Law Rep. 8 Ch. 1072.

(2) Law Rep. 9 Ch. 576.

(3) Law Rep. 8 Q. B. 290.

Now as to the effect of the *Conveyancing and Law of Property Act*, 1881. Sect. 6 imports into a conveyance the usual form of general words including "fixtures." A conveyance is, therefore, to be read as if those words were inserted. Then sect. 19, sub-sect. 1, gives power to the mortgagee to sell the mortgaged property, or any part thereof, either together or in lots. Here there being only one building, the words as to selling in lots cannot be satisfied unless they are held to authorize a sale of the fixtures separately.

[COTTON, L.J.:—Do you contend that a Court of Equity would not restrain a mortgagee from selling separately the fixed machinery which makes a mill valuable?]

Yes. We say that the mortgagee might sell separately any property which the Acts treat as being capable of being dealt with separately, and which is fairly severable. It is not like a case of mere waste, such as pulling down the chimneys and selling the bricks. We do not contend that a mortgagee could do that.

[BOWEN, L.J.:—How do you distinguish this from *Ex parte Barclay* (1)?]

In that case there were two cottages, so that the words as to selling in lots could be satisfied.

[LINDLEY, L.J.:—According to your construction the provision in sect. 19, sub-sect. 1, clause iv., as to cutting timber appears to be surplusage.]

French, Q.C., and *Maberly*, *contrà* :—

[COTTON, L.J.:—We only desire to hear you as to the effect of the power of sale given by the *Conveyancing Act*, 1881.]

The enactment which did away with the use of general words did not provide that every conveyance should be read as if those words were inserted in it, it merely stated the effect of a convey-

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(1) Law Rep. 9 Ch. 576.

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ance which did not contain them. It is not, therefore, a sound process to import those words as if the deed had enumerated the fixtures, for the purpose of treating the power to sell in lots as giving a power to sell the fixtures separately. Then as to the power of sale given by the Act, the words of it are not incorporated in the mortgage deed; it is a general power given to a mortgagee, and must be construed with reference to the property subject to it. There might be some plausibility in the argument of the Appellants if we found a power to sell in lots inserted in terms in a mortgage of a property so circumstanced that it could not be sold in lots of the ordinary kind; but it would be a very strained construction to hold that this general power was intended to give mortgagees authority to dismantle the property and sell the doors and windows apart from the house—for that is what the argument of the Appellants really must come to. Even in the case of a single house the words would better be satisfied by selling it in flats.

Cozens-Hardy, in reply:—

[COTTON, L.J.:—Is there any authority deciding that a mortgagee can sell fixtures separately.]

There does not appear to be any authority either way.

1888. March 10. COTTON, L.J.:—

The mortgage to which this appeal relates was a mortgage in fee of land and buildings, without any mention of fixtures. There was in the mortgaged buildings a considerable amount of trade machinery. It was contended that the mortgage was a bill of sale of the trade machinery, and that as it did not conform to the provisions of the Acts relating to bills of sale it was altogether void both as to the trade machinery and the freehold. The Vice-Chancellor held it to be good as to both. After the case was argued before us it was decided by the other branch of the Court of Appeal in *In re Burdett* (1), that where a bill of sale not in the statutory form comprises both fixtures which are chattels within the Act and fixtures which are not, it is void only as to the former but valid as to the latter. On the re-argument, therefore, the

(1) 20 Q. B. D. 310.

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point that the mortgage was bad as to the freehold was given up, but it was insisted that it was invalid as regards the trade machinery, and that is the point we have now to decide.

The question turns on the construction of the *Bills of Sale Act*, 1878 (41 & 42 Vict. c. 31). Sect. 3 enacts that the Act shall apply to every bill of sale executed after the 1st of January, 1879 (whether the same be absolute or subject or not subject to any trust), "whereby the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised in or subject to such bill of sale." That section is very material, as also are some parts of sect. 4: "The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." Then follows the exception of certain instruments, into which it is unnecessary to enter. "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." Then comes sect. 5, which causes the difficulty by saying that a thing is something which it is not, and which it cannot be: "Trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels, shall be deemed to be a bill of sale within the meaning of this Act." I think that Mr. *Cozens-Hardy* put the true construction on this provision—that it was intended to exclude dispositions of trade machinery such as those dispositions of personal chattels which by sect. 4 were excluded from the definition of bills of sale. It has been suggested, however, that this mortgage cannot be considered as an assignment of the trade machinery, since it does not purport to assign it at all, and the trade machinery, if it passes, merely passes as affixed to the land conveyed. Then sect. 7 is material: "No fixtures or growing crops shall be deemed, under this Act, to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person." A broad distinction is drawn between trade machinery and other fixtures, and the effect of sect. 7 appears to be to exclude the operation of *Ex parte Daglish* (1), in cases of fixtures not coming under the head of "trade machinery" within the Act.

I have now gone through the material sections of the Act, and we have to consider whether this mortgage deed can be deemed an assignment of personal chattels, or an instrument giving power to seize or take possession of personal chattels. On both those points I am against the Appellants. The mortgage is simply a conveyance of the land, it gives the mortgagee a right to the trade machinery, not as something assigned by the deed, but as annexed to the land, and so passing by the conveyance of the land. Nor, I think, does it give the mortgagee power to take possession of chattels. It empowers him to take possession of the land, but he can take possession of the trade machinery in no other way than by taking possession of the land to which it is affixed. Where an instrument is simply a mortgage of the fee simple of a freehold property, it cannot be such an instrument as is pointed out by the *Bills of Sale Act*, an instrument authorizing the holder to take possession of chattels apart from the land on which they are. I hold that under this mortgage, the mortgagee had no power to sever the chattels from the land, he would only have a right to do so, if a power of sale was given to him which authorized him to sell them separately. Apart from recent legislation a mortgagee with an ordinary power of sale could not sell mines separately from the surface, any more than a trustee for sale could do so. So a mortgagee with a power of sale could not in my opinion sell fixtures separately, unless upon the fair construction of the power it appeared that it was intended to give him authority to do so.

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(1) Law Rep. 8 Ch. 1072.

We then come to the *Conveyancing and Law of Property Act*, 1881. The reason why we had the case re-argued was, that it had occurred to a member of the Court that possibly the power of sale given to mortgagees by that Act could be treated as giving a mortgagee an authority to sell fixtures separately, and so bring the case within *Ex parte Daglish* (1). In my opinion that is not its true construction. The power given is to sell "the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby." Does that give power to sell the fixtures separately? In my opinion it does not. Here the mortgagee conveyed a piece of land, by no means of small extent, about seventy yards long by thirty-seven feet wide, and there is nothing to prevent its being sold in lots in the ordinary sense of the word, the house, the yard, and the out-buildings, could be sold separately. Mr. *French* suggested that if a house was the only subject of a mortgage, this power might be held to authorize selling it in flats. I do not agree with that suggestion. I do not think that the power authorized the mortgagee to break up the state of things which then existed by selling anything apart from the land to which it was affixed. Mr. *Cozens-Hardy*, who never misses any point, argued that we must read the mortgage as if all the general words mentioned in sect. 6 of the *Conveyancing Act* had been written into it, and that then the power to sell "any part thereof" should be construed as a power

(1) Law Rep. 8 Ch. 1072.

to sell fixtures, as being a part of the property expressed to be mortgaged. But this provision, which was only intended to prevent verbosity in conveyancing, says merely that a conveyance of the land shall have the effect of passing the particulars there mentioned, which were commonly expressed by conveyancers, although they really passed by a mere conveyance of the land. We are then asked to say that in construing a deed those general words are to be treated as written into it, for the purpose of drawing the conclusion that a power to sell "any part" of the mortgaged property gives a power to sell the fixtures separately, as being a part of the things enumerated. It would, in my opinion, be wrong to hold that the power of sale gives any authority to sell the trade machinery separately.

I have thus far given my opinion on the case independently of authority, but I think that the decisions in *Ex parte Daglish* (1) and *Ex parte Barclay* (2), on the previous Act of 1854, which is not, it is true, quite in the same terms, have a very considerable bearing on the true construction of the power of sale, and also on the question whether this ought to be considered a bill of sale within the meaning of the Act of 1878. The definition of "bill of sale" in the Act of 1854 (17 & 18 Vict. c. 36), s. 7, included, besides assurances of personal chattels, "powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt." The definition of personal chattels included all fixtures. Under the present Act the words "personal chattels" do not include all fixtures, but they do include the trade machinery we are considering. In *Ex parte Daglish* there was a mortgage containing a power of sale which authorized the mortgagee in express terms to sell the fixtures separately from the land. The Lords Justices said in effect: "This may not be an assignment of fixtures, but the power of sale enables the mortgagee to take possession of and seize these things as severed from the land, and therefore it comes within the definition of bill of sale given by the Act, and the Act applies to it."

In *Ex parte Barclay* there was a mortgage of land with the fixtures on it, and a power of sale authorizing the mortgagee to sell the property, or any part thereof; and both Lord Justice

(1) Law Rep. 8 Ch. 1072.

(2) Law Rep. 9 Ch. 576.

James and Lord Justice *Mellish* held that it was not a bill of sale—for that it only passed the chattels as annexed to and forming part of the land demised. Lord Justice *James* says (1): "The question here is, whether there really has been any separate sale of the fixtures, or any separate license or authority to take the fixtures and sell them." And again (2): "I do not think that, under the power to sell the chattels as fixtures, the mortgagees would have a right to go in and dismantle the house, and take away the fixtures, and sever them from the property." That is the conclusion at which I arrived on the power of sale in the case now before us, that on the terms of it the mortgagees would not be authorized to go in and sever this trade machinery, and sell it as something separate and distinct from the land to which it is affixed. Lord Justice *Mellish* says (3): "I think that when a lessee who has put in trade fixtures, and is, according to the ordinary law, entitled to remove those fixtures as against his landlord, mortgages the premises with the fixtures upon them, the test whether the mortgage, so far as respects the fixtures, requires to be registered under the *Bills of Sale Act*, is whether he gives power to the mortgagee to sever the fixtures from the premises, and to deal with them and sell them separately." That case, in my opinion, lays down this principle, that where there is a mere conveyance of land, which conveyance by itself gives the mortgagee a right to all the fixtures upon it, including the trade machinery, that is not to be considered as an assurance of personal chattels so as to come within the Act, although the Act makes the trade machinery personal chattels. It was said that *Ex parte Barclay* (4) turned on this, that it was a mere mortgage by way of demise. But that contention will not hold good. The case appears to me to turn upon the fact that the fixtures only passed by the deed because they were annexed to the land demised by the deed. I do not, however, decide the present case on that authority, but having expressed my own opinion as to the true construction of the Act, and its effect as regards this instrument, one ought not to omit noticing those cases, for they have a very material bearing on the points before us.

(1) Law Rep. 9 Ch. 580.
(2) Ibid. 581.
(3) Law Rep. 9 Ch. 582.
(4) Ibid. 576.

In my opinion the decision of the Vice-Chancellor was right, and the appeal must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. The case is an important one, because it raises the question what are the rights of a mortgagee of cotton mills and other similar factories where the mortgaged property includes valuable trade machinery. The question we have to decide is this, whether a mortgagee of a mill, under a mortgage framed as this is, can seize and sever and sell, apart from the land or mill, the trade machinery on it. If he can, then it strikes me, that, as regards trade machinery, it would be impossible to avoid the conclusion that this is a bill of sale, and void because it is not registered. Now in order to dispose of that question we must look at the mortgage and see what it is. It consists of two distinct parts, first there is the conveyance, subject to a proviso for redemption, and then there is the power of sale. The two portions must be considered separately. For the purposes of the *Bills of Sale Act* it is necessary to ascertain the character of the instrument as a conveyance or assignment. Can anybody, with any regard to accuracy of language, say that a mortgage of land in fee simple is an assurance of personal chattels? It is impossible; and it is not the less impossible because the land by force of law carries with it things which are affixed to it, and which if detached from it would be personal chattels. Neither does trade machinery which follows the land become personal chattels for the purpose of considering the question whether a conveyance of the land is an assignment of it. The trade machinery passes as a portion of the land, not as personal chattels; and, if you look at this conveyance, you cannot find, from first to last, anything about personal chattels. If you can import into it all the general words found in sect. 6 of the *Conveyancing and Law of Property Act*, still you cannot come to the conclusion that this is an assurance of personal chattels in the correct acceptation of the word. It is a mortgage of land, nothing more, nothing less.

Pausing there for a moment, I think the point is so covered by authority as to be clear beyond all question. It is precisely the same point as was raised and decided by Vice-Chancellor *Wood* in

Mather v. *Fraser* (1), decided under the Act of 1854. The Vice-Chancellor says (2): "If the fixtures passed . . . by the mere grant of the land and mills or factories, it was conceded by Mr. *Daniel*, although Mr. *Little* did not seem quite to accede to that view, that the question as to the Act for the Registration of Bills of Sale does not arise. It does not seem to me possible that it can arise. That Act only says, that where a person makes a bill of sale of any part of his chattels, including fixtures, that bill of sale must be registered in a particular way. Here, no bill of sale was ever required to be made. A conveyance is made of the freehold, and that conveyance carries fixtures. To hold that an Act of Parliament, which says, that, where bills of sale are used, they shall be dealt with in a particular manner, applies to a case where no such thing is used or required to be used, but where the whole of the property passes by the conveyance of the fee simple, would be to give a construction to the Act far beyond anything which was within its purview." This decision has been followed by many others; and although the language of this Act of 1878 varies considerably from the language of the Act of 1854, it appears to me that those observations are just as applicable to the one Act as to the other.

Then arises another point, which is totally distinct, namely the effect of the power of sale. The power of sale which the mortgagee here possesses is conferred upon him by the 19th section of the *Conveyancing Act* of 1881, which says, "A mortgagee, where the mortgage is made by deed, shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further, namely: a power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract." This part of the case turns on the true effect of the power "to sell the mortgaged property or any part thereof." What is the mortgaged property? It is land. "Any part thereof" is, any part of the mortgaged property which is land, and it appears to me we should be forcing this language if we held that a mort-

(1) 2 K. & J. 536. (2) 2 K. & J. 558.

gagee of land could sell, not part of the land, but a chattel affixed to the land as distinct from the land. It appears to me that such a construction would be a forced one, not warranted by the words of the Act or by the ordinary practice of conveyancers. I am fortified in that observation by a precedent in Mr. *Davidson's* valuable work (1), of a mortgage of a mill and machinery, where the power of sale expressly authorizes the mortgagee to sell the fixtures "either together with the buildings or land to or upon which the same shall be fixed or stand or be, or separately and detached therefrom." That shews pretty well what the understanding of conveyancers is, and it appears to me that a mortgagee of land in this form has the trade fixtures as part of his security, and under a power of sale in this form can sell the land wholly or in part, but cannot sever the fixtures and sell them separately. I am of opinion that if the mortgagee of a mill wants to have the power of selling the trade machinery apart from the mortgaged property he must have a bill of sale. That is, I think, a practical solution of the whole question, and I have come to the same conclusion as the Lord Justice, that the *Bills of Sale Act* does not in any way touch this security.

BOWEN, L.J.:—

I am of the same opinion. Here is a mortgage in fee of land with buildings upon it, which introduces the power of sale in the *Conveyancing and Law of Property Act* of 1881. Upon the land are certain fixtures attached to the land and certain trade machinery; and inasmuch as the Act of 1878 declares that trade machinery shall be deemed personal chattels, the question has arisen whether, as the trade machinery necessarily passes with the mortgage in fee of the land to the mortgagee, this was or not a bill of sale of such trade machinery. If it was a bill of sale of such trade machinery, so much of it as operated in that character would be bad. The remainder of the mortgage, no doubt, would still be valid, as was pointed out by a decision which seems manifestly right, and was lately given in the other division of the Court of Appeal.

What we have to inquire in the present case is, whether this is a bill of sale of trade machinery? In order to make it a bill of sale of trade machinery, assuming for the purposes of the inquiry that trade machinery is to be treated as personal chattels under the Act, it must be an assurance of such trade machinery, or a license to take possession of it, in the sense in which an assurance and a license to take possession are defined by the Act with regard to other personal chattels. That raises neatly the point whether the mortgagee of such premises under such a general mortgage as this can seize and sever the trade machinery. This question divides itself into two branches. First, suppose the power of sale given by the *Conveyancing and Law of Property Act* of 1881 was excluded and no power of sale substantially similar substituted for it, what would be the law? Secondly, is there any difference to be made having regard to the 19th section of the *Conveyancing and Law of Property Act* of 1881?

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(1) 4th Ed. vol. ii., pt. 2, p. 369.

With regard to the first question, as to the general possession of trade machinery apart from special power of sale, I really entertain no doubt that a mortgage is not a bill of sale of the trade machinery unless it assures the trade machinery as such, or gives a license to take possession of it as such. The Act of 1878 begins with sect. 3, which indicates the scope and area of the Act. It is an important section for that purpose, but it leaves for further definition what is a bill of sale, because it only says that the Act is to apply to every "bill of sale" giving certain powers. To find out what a bill of sale is we must pass to sect. 4, and there the language is precise and has received a recent elucidation from a recent judgment of this Court: *North Central Wagon Company* v. *Manchester, Sheffield, and Lincolnshire Railway Company* (1), in which we pointed out that the essence of a bill of sale was that it must be an assurance of personal chattels, or a license to seize or take possession of them within the meaning of sect. 4. But then comes sect. 5, which introduces the real difficulty as to trade machinery, because it enacts that for the purposes of the Act trade machinery is to be deemed that which it is not, and which no lawyer would recognise it as being, namely, personal chattels. One cannot help marvelling at the modern method of draughtsmanship which introduces into particular expressions subject-matters which, in the common parlance of lawyers, could not otherwise possibly be brought within them. According to the modern system an Act of Parliament might be passed with regard to dairy farms, which after a number of regulations as to how cows are to be milked, went on to say that for all purposes of the Act a horse is to be deemed to be a cow. That is the modern system of draughtsmanship; and when Courts of Justice have to construe Acts so drawn the difficulties are almost insuperable. I think the words in sect. 5, as to a disposition of trade machinery, were intended only to exclude from the Act such dispositions as, if they related to ordinary personal chattels, would not be within the Act. Assuming, then, that for the purposes of the Act trade machinery is personal chattels to all intents and purposes, we still have to come back to sect. 4, and find out whether this is an assurance of trade machinery in the sense in which the term "assurance" is used as to personal chattels. It cannot be treated as such an assurance, for it does not seem to give the mortgagee any right to the trade machinery apart from the land. The trade machinery simply follows the land as the shadow follows the substance.

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(1) 35 Ch. D. 191.

But then we have to consider the power of sale which is given by the Act of 1881; and, no doubt, a serious question arises as to whether or no that power of sale, having regard to its special terms, which enable mortgagees to break up into lots and to sell in lots the mortgaged property or any part thereof, enables a person who takes a mortgage in the ordinary form of a freehold estate on which there are trade machinery or fixtures, to sever the fixtures and sell them as if they were a part of the mortgaged property. I cannot think that this was the intention of the section. I think the framers intended that what was sold should be a separable part of the mortgaged property in the state in which it was subjected to the mortgage. I cannot believe for a moment that the mortgagee of a house could sell the chimneys of the house without selling the rest of the house, or could sell the fixtures or mantelpieces in the house and say they were part of the house. They are part of the house in the sense that they follow the house as a necessary concomitant of it in a conveyance of the house, but they are not separable parts of the house for the purposes of this section. The subject-matter of the particular conveyance or mortgage has of course to be considered in applying the Act of 1881. You must see, having regard to the subject-matter which is mortgaged, what power the term "power to sell any part" gives you; and when a mortgagee gets a workshop with machinery in it, I do not believe that the power enables him to sell the machinery apart from the shop any more than it enables him to sell the chimneys apart from the house. Some light is thrown in that direction by the provisions as to timber in the 4th clause of the 1st sub-section of sect. 19, which seems to shew that but for the special sub-section it would not have been in the power of a mortgagee to sell the timber of the estate, although the timber would pass as an incident of the land.

For these reasons it seems to me to be plain on the construction of the Act that the decision of the Court below was right.

I agree that if a mortgagee desires to have the power to sell the trade machinery separately he must have a bill of sale of the trade machinery, which would give him the power to sell and deal with it as trade machinery. With regard to what has fallen from Lord Justice *Cotton* as to the previous decisions, I wish to add nothing to what he has said, and, indeed, I should have added nothing upon the main portion of this case if it were not that the matter is one of some importance.

Solicitors for Appellants: *Pritchard, Englefield, & Co.*

Solicitor for Respondents: *J. H. Lydall,* agent for *T. & T. Martin, Webb, & Hime, Liverpool.*

H. C. J.

C. A.
1888
March 13, 14.

FOSTER *v.* WHEELER.

[1886 F. 1120.]

Agreement to enter into Agreement with Third Party—Damages.

An agreement was made between *F.* and *W.* that *W.* would enter into an agreement with *F.*'s landlord, *O.*, for a lease at a given rent for such term and subject to such covenants as *O.* should approve, and that *F.* upon such lease being granted would surrender his lease. *W.* refused to carry out this agreement:—

Held (affirming the decision of *Kekewich*, J.), that *F.* was entitled to damages from *W.* for breach of the agreement.

IN April, 1886, the Plaintiff, Mr. *Foster*, was possessed of a house called *Cedar Lodge* for a short residue of a term created by a lease granted by Dr. *George Ord.*

On the 9th of April, 1886, the Plaintiff and Defendant signed the following agreement:—

"(1.) Within seven days from the date hereof Miss *Wheeler* is to enter into a binding agreement with Dr. *George B. Ord*, the lessor of *Cedar Lodge, Queen's Road, Clapham Park*, for a lease from Dr. *Ord* of the said premises at a rental of £140 per annum for such a term (to commence from the 24th day of June next) and subject to such conditions as Dr. *Ord* shall approve and Miss *Wheeler* shall accept and take up such lease when ready and if so required execute a counterpart thereof.

"(2.) Upon such lease being granted, or immediately preceding the same, Mr. *Foster* is at the request of Dr. *Ord* or Miss *Wheeler* to execute a surrender to Dr. *George P. Ord* of the present lease of the premises.

"(3.) If Miss *Wheeler* elects to take the tenant's fixtures on the premises, she is to give notice in writing of such her election not less than fourteen days before the said 8th day of May next, and thereupon the price to be paid is to be fixed by valuation in the ordinary way.

"(4.) Upon due fulfilment of the provisions on her behalf contained in clause 1, and upon payment of the agreed price of the fixtures, and £16 5*s.* (the amount of the apportioned rent from the 8th of May to the 24th of June, 1886), Miss *Wheeler* is to be entitled to possession."

Dr. *George Ord* was dead. He had been entitled to the premises for a long term, and had left a will, of which his sons Dr. *George Rice Ord* and *William Millar Ord* were the executors.

Miss *Wheeler* entered into a negotiation with Dr. *Ord* for a lease. He was willing to grant a lease at £140 for twenty-one years, determinable by the tenant at seven or fourteen years, and a draft lease was sent, the terms of which were not objected to, though it was not formally approved by Miss *Wheeler's* solicitors, and no binding agreement was entered into by her with the lessor to accept a lease. She ultimately refused to proceed any further with the business.

On the 12th of July, 1886, Mr. *Foster* commenced this action, claiming specific performance of the agreement, or, in the alternative, damages for the breach of it. Mr. Justice *Kekewich* held that he was entitled to damages, and gave a judgment directing an inquiry to ascertain them (1). The Defendant appealed, and the appeal was heard on the 13th and 14th of March, 1888.

Warmington, Q.C., and *Job Bradford*, for the Appellant, contended that the agreement was void for want of consideration, and was too indefinite to be enforced: *Pearce* v. *Watts* (2); *Marshall* v. *Berridge* (3).

Barber, Q.C., and *Yate Lee*, for the Plaintiff, were not called upon.

Cotton, L.J.:—

This is an appeal by the Defendant from a judgment of Mr. Justice *Kekewich*, giving an inquiry as to damages against her. The first clause of the agreement between the parties, subject to what I shall have to say as to its construction, contains a contract to enter into an agreement for a lease with a certain person,

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(1) 36 Ch. D. 695.

(2) Law Rep. 20 Eq. 492.

(3) 19 Ch. D. 233.

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Dr. *Ord*. If he had been a party to the contract, and had been coming to enforce it, it may be that it would be held to be too vague to be enforced, though I do not decide that it would. But it is an agreement with Mr. *Foster* to enter into an agreement with Dr. *Ord* to take a lease at a certain rental and from a certain day for such a term and subject to such covenants as Dr. *Ord* shall approve, and if he fixes the terms and settles the covenants Miss *Wheeler* is bound to accept the lease. It was contended that to make a binding agreement Miss *Wheeler* and Dr. *Ord* must agree as to the term to be granted; and, no doubt, that would be necessary to enable Dr. *Ord* to obtain specific performance of an agreement with himself. But as between the Plaintiff and the Defendant, if Dr. *Ord* fixes the term the Defendant is bound to accept a lease for that term and with such covenants as he determines.

It was urged that there was no stop after the word "approve," and that it ought to read, "subject to such covenants as Dr. *Ord* shall approve and Miss *Wheeler* shall accept." That is a most unnatural construction. If that had been intended we should have had some such expression as this, "as shall be agreed upon between Dr. *Ord* and Miss *Wheeler*." Upon this construction, moreover, you have to go back to the very beginning of the clause to find a nominative to the verb "take up." In my opinion the construction of the clause clearly is what I have stated.

Then it was said that there was no consideration. It is true that in clause 1 no consideration appears. But the next clause, by which the Plaintiff agrees to surrender his lease if requested, shews a consideration. In the absence of request, he is not bound to do anything, but his undertaking to surrender if requested is certainly a valuable consideration.

It was urged that Dr. *Ord* was dead, and that this was a contract to enter into an agreement with a dead man. But the leasehold interest of Dr. *Ord* is vested in his executors, who are his two sons, one of whom is called Dr. *Ord*, so there is really nothing in this objection.

If the Appellant could shew that nothing more than nominal damages could possibly be obtained the appeal might be right, but that is not shewn to be the case.

LINDLEY, L.J.:—

I agree. Miss *Wheeler* unfortunately put her name to an imprudent agreement. But she has signed it, and, as the Lord Justice *Cotton* has shewn, there was a consideration for it. Then it is said everything is so uncertain that the document is worthless. Its vagueness might be important if we were considering the question of specific performance, but we are not—we have only to consider whether an action for damages will lie, and I cannot see why it should not. Miss *Wheeler* agreed with the Plaintiff to accept a lease for such term and under such covenants as Dr. *Ord* should approve, and she refuses to do so. She has therefore broken her agreement, and I cannot say that the damages must of necessity be merely nominal.

BOWEN, L.J.:—

The only question we have to decide is whether there has been a breach of contract in respect of which more than nominal damages may possibly be recovered. The Appellant contends that there is no contract which the Court can enforce, and she first relies on the ground that there is no consideration. But, as the Lord Justice *Cotton* has stated, the second clause clearly furnishes a consideration. Then it is contended that the agreement is too uncertain to be enforced. That is based upon a confusion of ideas, it proceeds on the assumption that we are discussing the terms as between Dr. *Ord* and Miss *Wheeler*. Now suppose there was nothing further known about the terms of the lease than what we find in this agreement, there would be no agreement of which specific performance could be enforced against Miss *Wheeler* either in the way of specific performance or damages, but if the agreement furnishes a standard from which the terms can be ascertained, then the maxim *id certum est quod certum reddi potest* applies. Here there is a contract by Miss *Wheeler* to enter into an agreement the terms of which are to be dictated by Dr. *Ord*. If a person will bargain that in seven days he will enter into an agreement for a lease on terms to be determined by *A. B.*, and then refuses to do so, he must pay damages. It was attempted to compare this case with one where a person agrees to do what

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is impossible in law. If a person agrees to do what is impossible in fact you have only to consider whether on the fair construction of the agreement he made himself liable to pay damages if he did not do it; but if a person binds himself to do what depends on the caprice of the third person he must suffer if he cannot get that third person to exercise his caprice in his favour. There is a case in the Year Books where it is said that if a person for a consideration agrees to pay a sum of money if the Pope does not come to *Westminster* in three days, and the Pope does not come, he must pay. It is said that this agreement is absurd, because Dr. *Ord* was dead. There was a Dr. *Ord* that was dead, but there was one living, and there can be no doubt that the agreement referred to the living one.

We have further to consider whether the Plaintiff can recover more than nominal damages. The measure of damages depends on circumstances which are not fully before us. If it turns out that Dr. *Ord* acted reasonably as to the lease, and that Miss *Wheeler's* was a wanton refusal to accept it, the damages may be very substantial. We decide nothing further than that the matter must go to an inquiry. The Plaintiff must at all events recover whatever loss to him arose naturally and immediately from his being left with the property on his hands. When the damages are ascertained, then, as Miss *Wheeler* has married, *Scott* v. *Morley* (1) shews the proper form of order.

Solicitors for Plaintiff: *Wansey, Bowen & Co.*
Solicitors for Defendant: *Wild, Browne & Wild.*

H. C. J.

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(1) 20 Q. B. D. 120, 132.

WAITE *v.* MORLAND.

C. A.
1888
March 15, 20.

[1863 W. 36.]

Married Woman—Judicial Separation—Property subsequently acquired—Restraint on Anticipation—20 & 21 *Vict. c.* 85, *s.* 25 [*Revised Ed. Statutes, vol. xiii., p.* 254].

A wife who has obtained a decree for judicial separation is to be considered as a *feme sole* with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: the 25th section of the *Divorce and Matrimonial Causes Act*, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree.

Cooke v. *Fuller* (1) distinguished.

MARY SPENLOVE, by her will, dated the 6th of September, 1847, gave one fourth share of her residuary estate, which by a codicil was altered to one third, to trustees in trust for Mrs. *S. Finney*, then *S. Waite*, during her life for her separate use without power of anticipation, and after her death in trust for her children as she should appoint by deed or will, and whether sole or covert, and in default of appointment in trust for her children and their issue as therein mentioned.

The testatrix died on the 14th of November, 1862.

Mrs. *S. Finney* married her present husband, *E. H. Finney*, on the 15th of October, 1863, and had one child only, *Alice Finney*. On the 15th of July, 1869, Mrs. *Finney* obtained a decree for judicial separation from her husband.

A suit was instituted for the administration of the estate of the testatrix, *Mary Spenlove*, and Mrs. *Finney's* share of the residuary estate was paid into Court and the dividends were ordered to be paid to Mrs. *Finney* for her life for her separate use.

By a deed-poll dated the 28th of July, 1887, Mrs. *Finney* irrevocably appointed the fund after her death to her daughter *Alice Finney* absolutely; and Mrs. *Finney* and her daughter now presented a petition asking that the fund might be paid out of Court to the trustees of the will or to the Petitioners.

Mr. Justice *Kay* refused to make the order on the ground that

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(1) 26 Beav. 99.

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there were only two trustees of the will instead of four as originally appointed, and that the trustees intended to change the investments, which might be to the prejudice of the reversioner. The Petitioners appealed from the decision.

Dundas Gardiner, for the Appellants:—

The fund belongs altogether to Mrs. *Finney* and her daughter, and they have a right to control the disposition of it. We therefore ask that it may be paid either to the Petitioners or to the trustees.

By the 25th rule of the *Divorce and Matrimonial Causes Act*, 1857, after a decree for judicial separation the wife is placed in the position of a *feme sole* with respect to her property (1); therefore the restraint on anticipation is gone. The section has been held to apply to property the title to which accrued before the separation, but is not reduced into possession till after the decree: *In re Insole* (2); *Cooke* v. *Fuller* (3); *In re Coward and Adams' Purchase* (4); *Dawes* v. *Creyke* (5). The restraint on anticipation is a creation of Equity: it only lasts during an effectual coverture; when the coverture is suspended it ceases.

Whiteway, for the trustees.

COTTON, L.J.:—

The petition in this case was brought by a married woman who has obtained a decree for judicial separation from her husband, and she asks to have it declared that she is entitled to have a fund in Court paid out to herself and her daughter, who is entitled to the capital after her death. The fund is held in trust for her during her life for her separate use, with a restraint on anticipation, but she relies on the 25th section of the *Divorce and Matrimonial Causes Act*, 1857, as taking away the restraint on anticipation, and placing the life interest in the fund at her disposal. I am of opinion that this section has no application here. The words are as follows:—[His Lordship read the section.] The section itself sets limits to the property to which it is intended to apply; it is not to apply to all property, but only to a limited class of property, namely, property which she may acquire or which may come to or devolve upon her after the date of the sentence and during the separation. Therefore the only question here is whether this fund is property which has been acquired by or has come to or devolved upon her since the date of the decree for judicial separation. In my opinion it cannot be said that this fund comes within that definition. It was contended that a different construction had been put upon the words of the section in other cases; but none of those decisions really affect the present case. In *In re Insole* (1) the property was a reversionary interest of the wife which came into possession after the decree for judicial separation, and there it was properly held that she took it as a *feme sole.* That case has, therefore, no application to the present. Then, in *In re Coward and Adams' Purchase* (2) there was a legacy to the wife which became payable before the protection order, but it was not reduced into possession by the husband, and after the protection order the person liable to pay it paid it to the wife; and the Master of the Rolls held he was justified in so doing. That is intelligible, but it does not govern the present case. Then in *Dawes* v. *Creyke* (3) there was a covenant for settlement of after-acquired property, and the fund came to the wife after the decree for separation and during the separation; and it was held by Vice-Chancellor *Bacon* that under those circumstances it was not bound by the covenant to settle after-acquired property. It is not necessary for us to express any opinion upon that decision, but there, in fact, the property did come to the wife after the decree, and it does not govern this case. The only other case which I need refer to is *Cooke* v. *Fuller* (1). We are not bound by that decision, and if it has the effect contended for by the Appellants I should decline to follow it. No doubt it is very similar to this case. A wife was deserted by her husband, and afterwards her father bequeathed a fund to her for her separate use without power of anticipation; and she subsequently obtained a protection order. Lord *Romilly* held that she was entitled to payment of the fund free from the restraint on anticipation. There may have been circumstances that justified the decision, but the case is very shortly reported, and the reasons for the decision are not stated. I am of opinion that in the present case the Petitioner is not entitled to have the fund paid out to her and her daughter.

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(1) 20 & 21 Vict. c. 85, s. 25: "In every case of a judicial separation the wife shall, from the date of the sentence and whilst the separation shall continue, be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her; and such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband whilst separate."

(2) Law Rep. 1 Eq. 470.

(3) 26 Beav. 99.

(4) Law Rep. 20 Eq. 179.

(5) 30 Ch. D. 500.

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(1) Law Rep. 1 Eq. 470.

(2) Law Rep. 20 Eq. 179.

(3) 30 Ch. D. 500.

With respect to the alternative prayer of the petition I think it will be safer not to pay the fund to the trustees, however good their intentions with respect to it may be. The appeal must therefore be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. We must bear in mind that this fund was not in fact acquired by, nor did it come to or devolve upon the lady, in any sense of the words, since the decree of separation, and therefore it seems to me impossible to hold that it comes within sect. 25 of the *Divorce and Matrimonial Causes Act*, 1857. None of the cases cited touch the present case except *Cooke* v. *Fuller*. But that case was not decided under the 25th section, but under the 21st, which has reference to a protection order, and is expressed in different terms. It is to this effect, that a woman deserted by her husband may apply to a magistrate and obtain an order "protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*." In *Cooke* v. *Fuller* the property came to the wife after her desertion by her husband, and the Master of the Rolls appears to have considered that the protection order operated as from the date of the desertion.

(1) 26 Beav. 99.

BOWEN, L.J.:—

I am also of the same opinion. The words of the 25th section are as plain as they can be; they limit the property to which it applies to property which the wife may acquire or which may come to or devolve upon her after the decree for separation. The cases cited are not in point. With respect to *Cooke* v. *Fuller* (1) I agree with what has been said by the other Lords Justices. In the present case the words of the Act admit of no doubt.

Solicitors of all parties: *Dangerfield & Blythe.*

M. W.

LICENSED VICTUALLERS' NEWSPAPER COMPANY *v.* BINGHAM.

C. A.
1888
NORTH, J.
Feb. 24.
C. A.
March 21.

[1888 L. 373.]

Copyright—Right to Name of Newspaper.

The Plaintiffs, on the 3rd of February, 1888, published the first number of a newspaper, and registered it at *Stationers' Hall* on the next day. No advertisement had been issued that a newspaper under that name was about to be published. On the 6th of February the Defendants published the first number of a newspaper with the same name. Very few copies of the Plaintiffs' paper had then been sold:—

Held (affirming the decision of *North*, J.), that the Plaintiffs could not restrain the Defendants from publishing their newspaper under that name, for that the registration at *Stationers' Hall* gave the Plaintiffs no exclusive right to the name, and that a title to it by user and reputation could not be acquired by a publication for three days with a very small sale.

THE Plaintiff company was registered as a joint stock company on the 28th of January, 1888. On the 3rd of February they published the first number of a weekly newspaper called "*The Licensed Victuallers' Mirror,*" and on the 4th they were registered as proprietors at *Stationers' Hall.* They duly deposited copies at the *British Museum.* Some advertisements of the intention to publish such a paper had been issued, but they did not mention its name, and no advertisement containing the name was published till the 6th of February. On the 6th of February the

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(1) 26 Beav. 99.

Defendant *Bingham* published the first number of a weekly newspaper with the same name, registered it at *Somerset House,* under the *Newspaper Libel and Registration Act,* 1881, on the same day, and entered it at *Stationers' Hall* under 5 & 6 Vict. c. 45.

Mr. *Gale,* the Plaintiffs' managing director and editor, on the 23rd of February deposed that about 100 copies of each of Nos. 1 and 2 had been sold, and that many times that number of copies had been sold of No. 3, which appeared on the 17th. No particulars were given as to the times of the sales.

The action was commenced on the 10th of February to restrain *Bingham* and his publishers from printing, publishing, selling, or disposing of, and from advertising, offering, or exposing for sale any newspaper by the name of "*The Licensed Victuallers' Mirror,*" or by any other name so similar to "*The Licensed Victuallers' Mirror*" as to induce the public to believe that such newspaper was that of the Plaintiffs published under the aforesaid title.

It was deposed to by Mr. *Gale,* the managing director of the Plaintiff company, that in January, 1888, the Defendants registered the following newspaper titles, viz., on the 20th of January, "*The Licensed Victuallers' Chronicle;*" on the 24th, "*The Licensed Victuallers' Herald;*" and on the 26th, twenty-six titles, each commencing with "*The Licensed Victuallers'*"; but "*The Licensed Victuallers' Mirror*" did not occur among them.

The Plaintiffs moved before Mr. Justice *North* for an injunction on the 24th of February, 1888.

Everitt, Q.C., and *St. John Clerke,* for the motion.

Cozens-Hardy, Q.C., and *Charles Browne, contrà.*

NORTH, J.:—

I do not wish to say anything that might prejudice the case at the trial, but I think it clear that I cannot grant an interlocutory injunction. On the 4th of February the Plaintiffs registered a paper called "*The Licensed Victuallers' Mirror,*" and gave the name of the place of publication. The first number was dated the 3rd of February. Down to that day they had been advertising their intention to publish a paper of which they did not give the name, and the first advertisement giving the name appeared in *The Sporting Life,* on the 6th of February. On that very day the Defendants published the first number of their paper, also called "*The Licensed Victuallers' Mirror,*" and on the same day they registered it. There is no evidence to shew that any sales of the Plaintiffs' paper had taken place before the 6th, and I do not see my way to granting an injunction against the Defendants. It is clear that there is no copyright in the name, and the only ground on which the Plaintiffs can claim to interfere with the Defendants is that the Defendants are not entitled to pass off a paper of their own as being the paper of the Plaintiffs. Before the Court can interfere on this ground there must be a knowledge of the existence and the value of the Plaintiffs' article which might lead the public to buy the Defendants' article as being that of the Plaintiffs'. Now, I am of opinion that on the 6th of February, so far as the evidence before me goes, the Plaintiffs' paper was not an article known in the market, or having any reputation which could induce the public to buy the Defendants' paper as being that of the Plaintiffs. The motion, therefore, must be refused.

C. A.

The Plaintiffs appealed, and the appeal was heard on the 21st of March, 1888.

Evidence was given on the appeal that on the 3rd of February the Plaintiffs sold five copies of their newspaper, on the 4th ten copies, and by the 9th eighty copies in all; and that since that time every copy of No. 1 had been sold. Shortly afterwards the sale became considerable.

Everitt, Q.C., and *St. John Clerke,* for the appeal:—

We have copyright in the newspaper, and when it is published the name is an integral part of it, and included in the copyright. The Defendants, therefore, have no right to take it. The title is part of our property. It is true that a mere announcement of intention to publish under a particular name does not exclude other people from using it: *Maxwell* v. *Hogg* (1); but when we had published under a particular name it became our trade-mark, and we could prevent other people from using it: *Kelly* v. *Hutton* (1); *Dicks* v. *Yates* (2).

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(1) Law Rep. 2 Ch. 307.

Cozens-Hardy, Q.C., and *Charles Browne, contrà*, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North* refusing an injunction to restrain the Defendants from continuing to publish a paper with the same name as that of the Plaintiffs. The cases where such injunctions have been granted depend on this—that the plaintiffs have obtained by user such a title to the name that another person can be restrained from using it, because by using it he would be passing off his paper as the paper of the plaintiffs. Here the Plaintiffs registered their paper on the 3rd of February last. It is admitted that mere registration gives no right to the exclusive use of the name. On the 3rd of February the Plaintiffs sold five copies; on the 4th ten copies, and by the 9th eighty copies in all. That small sale cannot give a right to the title on the ground of reputation. An attempt has been made to get the benefit of the much larger sale which shortly afterwards took place. But the question is, how did the case stand on the 6th, when the Defendants commenced their publication. It cannot be successfully contended that at that time the Plaintiffs could have become exclusively entitled to the name on the ground of its being better known as connected with their paper than as connected with that of the Defendants.

LINDLEY, L.J.:—

I am of the same opinion. The Plaintiffs must make out an exclusive right to the name. How have they acquired it? The *Copyright Acts* do not help them, for *Weldon* v. *Dicks* (3), on which they might have relied, is on this point overruled by *Dicks* v. *Yates*. They must then fall back upon the old principles and establish their right by a user which has given them a reputation. Now it is impossible to say that a reputation had been acquired by the mere publication for three days of a paper which during that time had only a very small circulation. The case is of importance, for it seems to me to be a flaw in the *Copyright* or *Trade Marks Acts* that they do not enable a person to acquire an exclusive right to the name of a newspaper, though commercially it may be of great value.

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(1) Law Rep. 3 Ch. 703.

(2) 18 Ch. D. 76.

(3) 10 Ch. D. 247.

BOWEN, L.J.:—

I am of the same opinion. I think that there is no copyright in the title of a newspaper. Then, have the Plaintiffs any exclusive right to the name? The title to the name depends on user. Lord *Westbury*, in *M'Andrew* v. *Bassett* (1), cited by Lord *Cairns* in *Maxwell* v. *Hogg* (2), says: "Property in the word, for all purposes, cannot exist; but property in that word, as applied by way of stamp upon a stick of liquorice, does exist the moment the liquorice goes into the market so stamped, and obtains acceptance and reputation in the market, whereby the stamp gets currency as an indication of superior quality, or of some other circumstances that render the article so stamped acceptable to the public." To go from a stick of liquorice to a newspaper, the publisher of a newspaper has no right to the exclusive use of its name till he has so used it that it is known as denoting his newspaper. For an action to restrain the use of it to succeed the plaintiffs must shew that the defendant is doing something calculated to deceive, that people are likely to buy the defendants' newspaper in the belief that it is that of the plaintiffs. To shew that to be the case there must have been such a sale as will establish in the mind of the public a connection between the name and the plaintiffs' newspaper. That can only be after a reasonable time. It is urged that the right must exist from the first publication; for if not, how are you to say at what time the right arises? No doubt there is a difficulty in fixing the time when it arises, but that does not authorize us to say that it has arisen before the publication has any reputation at all. Mr. Justice *North* appears to me to have stated the law as well as it can be stated.

Solicitor for Plaintiffs: *S. E. Lambert.*
Solicitors for Defendants: *J. C. Rutter & Son.*

H. C. J.

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(1) 10 L. T. (N.S.) 445. (2) Law Rep. 2 Ch. 307, 314.

C. A.
1888
March 21.

BARTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1886 B. 5422.]

Third Party Procedure—Liberty given to Third Parties—Rules of Supreme Court, 1883, *Order* XVI., *r.* 53.

An action was brought against a railway company to compel them to re-transfer stock which the Plaintiffs alleged to have been transferred out of their names by means of forged transfer deeds. The transferees were not made parties, but the company, under Order XVI., r. 48, served them with third party notices, claiming indemnity. The company, in their defence, set up all the grounds of defence that could be relied on against the Plaintiffs' claim. Some of the third parties desired to defend, and Mr. Justice *Kay* gave them liberty to appear at the trial and take such part as the Judge should direct. Two of them appealed from this order, asking that they might be at liberty to deliver a defence, appear at the trial, and put in evidence, and cross-examine the Plaintiffs' witnesses:—

Held, that the third parties were not, under the old practice, necessary parties to the action, and that as the company had raised all proper grounds of defence, and was *bonâ fide* defending the action, the order gave the third parties all reasonable protection, and that the appeal must be dismissed, for that while, on the one hand, the Court ought to take care that the third parties had full opportunity of seeing that the questions in the cause were fairly tried, it ought, on the other hand, to take care that the Plaintiffs were not embarrassed and put to expense by unnecessarily allowing persons, who were not necessary parties to the action, to take all the same steps as if they had been made defendants.

THIS was an action by the trustees of the will of *Samuel Barton* against the *London and North Western Railway Company*, and the statement of claim was to the following effect: That *Samuel Barton*, who died on the 2nd of January, 1870, by his will and codicil appointed *Thomas Barton* and his wife, *Ann Barton*, his executors, and bequeathed to them £10,500 consolidated stock in the *London and North Western Railway Company* upon certain trusts, and £1654 like stock, and £1000 £5 per cent. preference stock in the same company (afterwards converted into £1250 £4 per cent. stock), upon certain other trusts; that the probate was produced to the company, and that thereupon the several sums of stock were registered in the names of *Thomas Barton* and *Ann Barton*; that *T. Barton* and *A. Barton* assented to the bequests; that in July, 1886, *T. Barton* retired from the trusts, and *Elizabeth Ashe* was appointed a trustee in his place; that shortly afterwards *T. Barton* absconded, up to which time he had accounted for the dividends; that the Plaintiffs (*Ann Barton* and *E. Ashe*) had discovered that during the years 1874 to 1885 sums of consolidated stock to the amount of £11,641 and the whole of the preference stock had been transferred into the names of other parties, and that the company alleged them to have been transferred pursuant to transfer deeds executed by *T. Barton* and *Ann Barton;* that *Ann Barton* had never sanctioned any transfer, and that if any transfer deed purported to be signed by her, her signature was a forgery; that it was the duty of the company to keep an accurate register, and not to permit any transfer except in pursuance of a valid deed of transfer duly executed by the registered holders. The Plaintiffs claimed that the company might be ordered to appropriate or purchase and register in the names of the Plaintiffs £11,641 consolidated stock, and £1250 £4 per cent. preference stock, and to pay the dividends from July, 1886.

The company by their defence did not admit that the stocks had ever been registered in the names of *Thomas Barton* and *Ann Barton.* They averred that in every case in which stock the subject of the action had been transferred in the books of the company there had been lodged with them a deed of transfer executed by *Thomas Barton* and *Ann Barton;* and that *Ann Barton* had so recognised and adopted the deeds of transfer as to be now estopped from disputing the same. In the alternative they alleged that the deeds of transfer were effectual even if they were not the deeds of *Ann Barton,* and they pleaded the statutes 21 Jac. 1, c. 16, and 9 Geo. 4, c. 14.

On the 29th of June, 1887, the company obtained leave to serve third party notices under Order XVI., r. 48, on such of the transferees of the stock as were living, and the personal representatives of such of them as were dead. The notice was filed on the 12th of August, 1887, and was served on the present Appellants on the 18th. On the 10th of February, 1888, an application by the company for directions under Order XVI., r. 52, was heard by Mr. Justice *Kay* in Chambers. The Appellants asked to be allowed to defend the action, but declined to admit liability to indemnify the company if the action was successful. An order was made by which—the persons named in the 1st schedule thereto submitting to be bound by the result of the action, so far as related to the validity or invalidity of the transfers to them, and the persons named in the 2nd schedule claiming to defend the action as against the Plaintiffs, and the company and the persons in the 1st and 2nd schedules consenting to postpone the decision of all questions as to indemnity till after the determination of the question as to the validity of the transfers—it was ordered that the persons named in the 2nd schedule "be at liberty to appear at the trial of this action and take such part as the judge shall direct, and be bound by the result of the trial." All questions as to indemnity were reserved till after the trial. This order was in the form previously settled by Mr. Justice *Kay* in *Coles* v. *Civil Service Supply Association* (1).

Two of the persons named in the 2nd schedule appealed against so much of this order as applied to them, and asked that in lieu thereof it might be ordered that the Appellants should be at liberty to deliver a statement of defence to the Plaintiffs, and to appear at the trial of the action and oppose the Plaintiffs' claim so far as they might be affected thereby, and for that purpose to put in oral and documentary evidence and to cross-examine the Plaintiffs' witnesses, and that such further or other order might be made as would enable the Appellants, if they were to be bound by the result of the action on the question of the validity or invalidity of the transfers, to defend themselves freely in the action, or alternatively that the proceedings against the Appellants might be dismissed.

The appeal was heard on the 21st of March, 1888.

Vaughan Hawkins, for the Appellants:—

The company claim indemnity or contribution against us, and we therefore were liable to be served under the third party rules, whether the claim be valid or not: *Carshore* v. *North Eastern Railway Company* (2). Mr. Justice *Kay* on being applied to for directions made the order of which we complain. It was in the

(1) 26 Ch. D. 529.

(2) 29 Ch. D. 344.

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form settled by him in *Coles* v. *Civil Service Supply Association* (1). We say that it does not give us sufficient protection. Under the old practice of the Court we should have been necessary parties to the action: *Cottam* v. *Eastern Counties Railway Company* (2). Under Order XVI., rule 11, the Court has power to make us Defendants, and this would, I submit, have been the right course. We ought, then, to have as ample powers of defending as if we were Defendants: *Eden* v. *Weardale Iron and Coal Company* (3).

[Cotton, L.J.:—Why did you not appeal from the order making you third parties?]

It does not appear that we could.

Cotton, L.J.:—

I am of opinion that you might have moved to discharge the order if you considered yourselves aggrieved by it.

Lindley, and Bowen, L.JJ., concurred.

Clare, for the company:—

We do not care about the form of the order. We only insist on keeping the third parties here, so that we may not have to try the same questions over again against them if the decision should be adverse to us.

A. Whitaker, for the Plaintiffs:—

Our case is this—we say to the company "We are entitled to a sum of stock which stood in our names in your books. You had no right to transfer it out of our names except in pursuance of a transfer deed duly signed by us. If you have transferred it away under forged transfers, put it back in our names. We have no privity with your transferees, and are not to fight the matter with them. We go on your duty to us to keep your books correctly." We are not claiming any relief against the transferees; the case is wholly unlike *Cottam* v. *Eastern Counties Railway*

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(1) 26 Ch. D. 529.

(2) 1 J. & H. 243.

(3) 35 Ch. D. 287.

Company (1), where relief was sought against the transferees for the delivery up of specific things. Here the stock is not specific, so that we can say to a transferee "you have got something which is mine." The transferees therefore were not necessary parties to the action, and *Taylor* v. *Midland Railway Company* (2) supports that view. The form of order adopted is one settled by Mr. Justice *Kay* in a previous case. His Lordship has had many of these cases before him, and has laid down that as a general rule this form should be followed, for that the plaintiff ought not to be embarrassed by having a number of persons brought into the action and taking the same proceedings in it as if they were defendants, unless there is reason to believe that the defendants on the record are not defending the action properly.

V. Hawkins, in reply:—

In *Hildyard* v. *South Sea Company* (3) the transferee was treated as a necessary party.

[COTTON, L.J.:—Have you any case where the Court has given a third party so wide an order as you are asking for?]

Benecke v. *Frost* (4).

[COTTON, L.J.:—That was under the old rules.]

The Plaintiffs are in fact seeking relief against us—they are asking that stock should be re-transferred out of our names into theirs. It is true that they are not seeking to compel us to do anything—but that is not the test of our being necessary parties, the question is whether we are not interested in the result. The right to defend ought to be given to the person having the real interest.

[*Simm* v. *Anglo-American Telegraph Company* (5) was also referred to.]

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kay* by two persons who have been made parties under the third party rule: Order XVI., rule 48. The order giving the Defendant company liberty to serve them under that rule was not and cannot now be appealed from, and we, therefore, have not to deal with the question whether the case comes within the rule or not, but only with the question whether any injustice can be done to the Appellants by the order of Mr. Justice *Kay* which is now under appeal, and whether it does not really give them everything which can be required in order that the question by the decision upon which they are to be bound may be fairly tried in their presence.

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(1) 1 J. & H. 243.

(2) 28 Beav. 287; 8 H. L. C. 751.

(3) 2 P. Wms. 76.

(4) 1 Q. B. D. 419.

(5) 5 Q. B. D. 188.

The Plaintiffs by this action seek to impeach transfers of a considerable amount of *London and North Western* stock. They allege that the deeds of transfer were forgeries, and they bring their action against the *London and North Western Railway Company* alone, in order to make them answerable for stock not still appearing in the names of the Plaintiffs or in the name of their testator. Now, in my opinion, whatever may be the consequence as between the railway company and other persons who now appear on the railway books as the holders of this stock, that was a course which the Plaintiffs were at liberty to take, for it is well established that persons, whose stock is transferred out of their names in consequence of a forged deed of transfer, may go against the company whose duty it is to keep the register of stockholders, and say: "It was your duty to keep this stock in our names until it was effectually transferred by a deed of transfer duly executed by us or by persons who had authority to act for us, and as you have transferred it without the authority of a good deed of transfer you must replace it." That is the course which the Plaintiffs took. If they had sought to have the stock which they could trace into the names of the present Appellants re-transferred, then, of course, they must have made the present Appellants parties, and, in my opinion, they might have done so if they thought fit, making the railway company a party as the keeper of the books, that the company might be bound by the order to re-transfer the stock in their books. The Plaintiffs have not chosen to take that course, but have taken a course which they were fairly entitled to take if they thought fit. The railway company did not suggest that the Appellants should be made Defendants, but obtained an order for leave to serve them as third parties in order that they might be bound by the decision of the matters to be tried in this action, which are whether the signatures to the transfer deed are forgeries, and whether, if one only of them is a forgery, the transfer is binding on the Plaintiffs. Mr. Justice *Kay*, according to his usual course, has not given leave to the present Appellants to put in a defence or to administer interrogatories, but to attend at the trial of the action, with power, if the Judge thinks it right, to cross-examine witnesses, and, if the Judge thinks it right, to adduce evidence themselves in order to make out their case. If the Appellants had a case which was not properly raised by the defence of the railway company, they might ask the Judge to give them liberty to raise it, and if the Judge thought it was a reasonable case to be raised, and had not been raised by the Defendants, he no doubt would have given the Appellants liberty to raise it. But here, as far as I can see, every point which can be suggested on behalf of the Appellants is raised by the railway company. They traverse the statement that the stock was in the names of the two executors so as to make it necessary that a transfer should be executed by both of them, they allege that neither signature was a forgery, and then they raise the case that if one signature was forged, still, if the other is genuine, the transfer is binding on the Plaintiffs. I cannot see any other point that can be raised. Then will the case be fought sufficiently? If interrogatories are necessary in order to obtain from the Plaintiffs the admission of any facts, and the railway company have not administered interrogatories, the Appellants may tell the solicitors of the company what the facts are which in their opinion can be elicited from the Plaintiffs by interrogatories, and if it appears that these facts are likely to be serviceable for the purpose of the defence, the advisers of the railway company will no doubt be willing to file interrogatories for the purpose. If they decline to do so, either because they think the matters irrelevant, or for any other reason, then, in my opinion, the Appellants will have liberty to apply to the Judge in Chambers, and to get such directions from him as he thinks reasonable for the purpose of obtaining discovery from the Plaintiffs.

In my opinion the order under appeal gives the Appellants all that they can reasonably ask, for where all material grounds of defence are fairly raised by the defendant, a plaintiff ought not, in my opinion, to be embarrassed by the third party coming in and saying, "I wish to deliver a defence; I wish to administer interrogatories; I wish to take the same course as if I were a defendant." If the Plaintiffs here had sought for a different kind of relief, the Court might have said that the transferees ought not to be served as third parties but must be made Defendants. But, in my opinion, as I have already said, having regard to the relief the Plaintiffs seek, they were entitled, if they thought fit, to make the railway company the only Defendants to the action, and I cannot see that the Appellants are by the course which has been taken by Mr. Justice *Kay* deprived of any reasonable ground of defence. I think, therefore, that we ought not to disturb Mr. Justice *Kay's* order, which seems to be one suited to the case. There is considerable difficulty in dealing with cases like the present, because the practice is new; we must take care to prevent persons who have been summoned as third parties being subjected to injustice, but we must also prevent the plaintiff from being subjected to injustice, and in my opinion he would be so subjected if all persons served as third parties were at liberty to deliver defences just as if they were defendants, when the plaintiff has not made them so, and has only asked for relief which can be obtained without making them defendants.

I should add this, that as regards preparation for the trial, if the Appellants desire to take a reasonable course, they will communicate with the legal advisers of the railway company and tell them of any witnesses whom they think it would be advisable to call, and tell them of any facts which can be elicited by witnesses of whom the railway company may know nothing, and then if the railway company do not call them I have no doubt that if the Judge were told of these facts, and that the railway company, though informed of these witnesses and of what they could prove, would not call them, he would give liberty to the third parties to call them.

Lindley, L.J. :—

I am of the same opinion. I thought at first that the Plaintiffs under the old practice must have made Mr. *Hawkins'* clients parties, but Mr. *Whitaker* has satisfied me that they need not, and the cases of *Sloman* v. *Bank of England* (1) and *Taylor* v. *Midland Railway Company* (2) shew that the plaintiff in a case like this need not sue anybody except the company. That materially changes the aspect of the case.

The substantial question before us is, whether Mr. *Hawkins*' clients are put by the order in a position which exposes them to any risk of injustice. They are to be bound by the result of the trial of the question, whether these signatures were forgeries or not; and of the subordinate question, whether, assuming one signature to be a forgery, the other signature would be sufficient. Those are the questions to be tried, and the Appellants are to be bound by the result of the trial. What opportunity have they of seeing that those questions are fairly and properly investigated? The learned Judge has given them liberty to appear at the trial of the action, and take such part as the Judge shall direct, and the Judge has made that order having satisfied himself that the real Defendants, the railway company, who are not nominal Defendants, but have a very substantial interest, have raised in their defence the questions to which I have adverted, and that they will *bonâ fide* contest those questions. If Mr. *Hawkins*' clients are there to see that all is done that is right and fair, and if they are in a position (as under this order they are) to apply to the Judge to let them supplement any defect which may be apparent, it seems to me that no injustice whatever is done to them, and that their interests are efficiently preserved.

Under those circumstances I see no reason to think that injustice can be done to the Appellants under the order as it stands. I agree, therefore, that the appeal ought to be dismissed.

BOWEN, L.J.:—

I am of the same opinion. The Plaintiffs here are seeking to impeach the transfers as made by means of transfer deeds the signatures to which they allege to be forged. They brought the action against the company alone, and at first sight, after hearing Mr. *Hawkins*, it seemed to me, as I think it did to the other members of the Court, that there was good ground for saying that the company ought not to be the sole defendants, but that the transferees ought to be added as parties. But the tide of war was rolled back on Mr. *Hawkins* by the brief but extremely effective argument of Mr. *Whitaker*, who shewed conclusively, as it seems to me, that it is not essential in such an action as this that the transferees should be parties. The relief which is sought is not really a relief against the transferees at all; as this action is launched, relief is sought only against the company, and the Plaintiffs say: "We do not care at all what rights you have or what obligations you come under as regards the transferees; you had no right to strike our names out of your books as stockholders, and you are bound to recognise us as still entitled to the amount of stock which you have transferred out of our names." The case is quite distinct from *Cottam* v. *Eastern Counties Railway Company* (1), for in that case relief was sought directly against the transferee. Mr. *Hawkins*, I think, at last was compelled to admit that as the action was framed he could hardly say that the transferees were necessary parties. A judgment obtained in it against the company would only be a judgment *inter partes*, and but for the third party rule would not bind the transferees if they chose to re-ventilate the question. But, then, he contended that his clients had under that rule been made parties to the action in a way which bound them by the result of the proceedings, but had not received sufficient protection under the third party rule, nor been provided with adequate machinery for protecting their title. That obliges us to consider whether or not they have in fact received adequate protection under the third party rule. As to whether the Appellants were rightly or wrongly brought in as third parties, I do not desire to express any opinion; they were so brought in, and they submitted to it. They might, undoubtedly, have taken the course of applying to discharge the order, but they did not do so. Then a summons for directions was taken out to regulate what has to be regulated when a third party is brought in—the mode in which the questions were to be tried; so as, on the one hand, not to embarrass the plaintiff in the action, and add to the expense of his proceed-

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(1) 14 Sim. 475.

(2) 28 Beav. 287.

(1) 1 J. & H. 243.

ing, and, on the other hand, to protect the interest of the third party who is being brought in that he may be bound by the result of a litigation into which he was not originally introduced. In what way is he to be protected, keeping in mind that the plaintiff is not to be embarrassed? Rule 53 enables the Judge to do all that is necessary. If he thinks it right he may, upon such terms as are just, permit the third party to defend the action, but it would not be reasonable without imposing terms to give him liberty to defend the action, to add himself as a defendant, and to embarrass the plaintiff with a defendant who is not a necessary party to the action, and whose introduction into the action is not the plaintiff's work but the defendant's. Terms were offered by the learned Judge below and declined. But, then, the rule goes further. It gives the Judge power, if he does not give liberty to defend the action, still to give liberty to appear at the trial and take such part therein as appears to be just, that is to say, the third party may go to the trial and appear by his counsel and ask leave to cross-examine and to call witnesses if he makes out a case for so doing. The rule does not stop there, because it authorizes the Judge to order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions, as shall appear proper to the Judge for having the question most conveniently determined. What other protection do Mr. *Hawkins'* clients want? He was really unable to make out any case for any further protection. The *London and North Western Railway Company* are effectively defending this action against the Plaintiffs. If Mr. *Hawkins* could have made out that it was a sham defence, then he might, of course, have applied to the Judge, and applied to us on appeal to let his clients do what was not being effectively done, as appears to have been done on the application in *Witham* v. *Vane* (1). But no suggestion is made that the company are not effectively defending, and the third parties have no right to dress the defence in some particular way which pleases their eye, if their interests are being substantially maintained by the railway company. They have no right to ask for any discovery or liberty to deliver interrogatories, unless the railway company are failing in their

(1) 49 L. J. (Ch.) 242.

duty to defend the action effectively. There is not a shadow of a case that they are. On the other hand, if they do so fail Mr. *Hawkins'* clients can come here, because there is no doubt that liberty is reserved to him to make any application to the Court which, owing to matters subsequent to the order, may turn out to be necessary for the purpose of preventing miscarriage of justice. It seems to me that the third parties are adequately protected, and it would not be reasonable for the Plaintiffs to be hampered and embarrassed by a fresh defence delivered on behalf of a third party who really is outside the action so far as the Plaintiffs are concerned, or to be interrogated and vexed with discovery at the instance of such a person. If necessary to the purpose of justice it will be done, but at the present moment there does not appear to me to be any such necessity.

Solicitors for Plaintiffs: *Stephens & Stephens,* agents for *H. Hand, Macclesfield.*

Solicitor for Company: *C. H. Mason.*

Solicitors for Third Parties: *Palmer, Eland, & Co.*

H. C. J.

KAY, J.
1888
Feb. 20.

HOWARD *v.* PATENT IVORY MANUFACTURING COMPANY.

[1886 H. 3584.]

In re PATENT IVORY MANUFACTURING COMPANY.

Company—Contract on behalf of intended Company—Evidence—Ratification—New Contract—Power of Directors—Mortgage of Unpaid Capital—Borrowing Power—General Power controlled by Special Power.

J. entered into an agreement with *W.*, who purported to act on behalf of a company about to be formed, to sell certain property to the company. The company was formed shortly afterwards with a memorandum and articles of association containing provisions for the adoption of the agreement by the directors on behalf of the company with or without modification. At meetings of the directors at which *J.* was present, resolutions were passed adopting the agreement, accepting an offer of *J.* to take payment of part of the purchase-money in debentures instead of in cash, and directing that the seal of the company should be affixed to an assignment by *J.* to the company of leasehold property comprised in the agreement, and to debentures to be issued to *J.* The assignment was executed by *J.* and sealed by the company; the debentures were issued to him, and the company took possession of the leaseholds and carried on their business thereon. The company was afterwards wound up, and the liquidator took from *J.* an assignment of other property comprised in the agreement:—

Held, that there was evidence that a contract was entered into by the company with *J.* to the effect of the previous agreement as subsequently modified by the acceptance of debentures instead of cash, and that there was, therefore, at the time when the debentures were issued, an existing debt due from the company.

In re Northumberland Avenue Hotel Company (1) considered and distinguished.

The directors of a company were authorized to mortgage all or any part of the company's "properties and rights":—

Held, that the directors had power to mortgage the capital of the company for the time being uncalled.

Bank of South Australia v. *Abrahams* (2) distinguished.

On the 25th of April, 1885, an agreement was entered into between *T. R. Jordan* of the first part, *R. E. Commans* of the second part, and *William Wyber*, on behalf of the company intended to be formed as thereinafter mentioned, of the third part, whereby, after a recital that a company was about to be formed under the *Companies Acts*, 1862 to 1880, with the name of the *Patent Ivory Manufacturing Company, Limited*, it was agreed that *Jordan* should sell, and the company should purchase, a certain invention and the patents for the same, and that *Jordan* and *Commans* should sell, and the company should purchase, certain leasehold mills and hereditaments, plant, machinery, stock-in-trade, and goodwill particularly described. The purchase-money was to be £36,500, payable as to £6500 in cash to *Jordan* and *Commans* on the 25th of June then next, and as to £30,000 by the allotment to them or their nominees of fully paid-up shares.

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(1) 33 Ch. D. 16.

(2) Law Rep. 6 P. C. 265.

The company was registered on the 29th of April, 1885. By the memorandum of association, some of the objects for which the company was established were stated to be, to adopt, ratify, and carry into effect (either with or without variation) the agreement of the 25th of April, 1885; to acquire the invention, patents, mills and premises, plant, machinery, stock-in-trade, and goodwill above mentioned, and other property; and to borrow money on behalf of the company, and mortgage, sell, and dispose of all or any part of the company's properties and rights.

The articles of association provided as follows:—(art. 3), "the directors shall forthwith adopt, on behalf of the company, the agreement of the 25th of April, 1885, mentioned in the memorandum of association, and shall carry the same into effect, with full power nevertheless from time to time to agree to any modification thereof; (art. 94), the management of the business and the control of the company shall be vested in the directors, who, in addition to the powers and authorities by these articles expressly conferred on them, may exercise all such powers and do all such acts and things as may be exercised or done by the company, and are not hereby or by the statutes expressly directed or required to be exercised or done by the company in general meeting: but subject nevertheless to any regulations from time to time made by the company in general meeting, provided that no regulation shall invalidate any prior act of the directors which would have been valid if such regulation had not been made; (art. 95), without prejudice to the general powers conferred by the last preceding article, and of the other powers conferred by these articles, it is hereby expressly declared that the directors shall have the following powers: (*a*), to execute all deeds and documents which they from time to time think necessary, and for that or any necessary or advisable purpose to use the common seal of the company, (*b*), to borrow from time to time, on behalf of the company, such sums of money, not exceeding in the whole at any one time £1000, as the directors think necessary or advisable: also to raise such further moneys as may be authorized from time to time by resolution of any general meeting of shareholders summoned for the purpose, (*c*), to secure the repayment of any moneys so borrowed, together with interest, by debentures, mortgages, ... or otherwise, and generally in such manner, and upon such of the property and assets of the company, and upon such terms and conditions as the directors may think fit."

At a meeting of the directors on the 27th of May, 1885, at which *Jordan*, who was a director, was present, it was resolved that the agreement of the 25th of April, 1885, should be and the same was thereby adopted.

At a similar meeting on the 6th of June, 1885, *Jordan* again being present, it was resolved that in consideration of *Jordan's* accepting £3000 in cash and £3500 in debenture stock in the company bearing interest at the rate of 6 per cent. per annum (the expression "debenture stock" being apparently used by inadvertence instead of "debentures"), an allotment of shares should be proceeded with, and an allotment of shares to *Jordan* and others was then made.

At a similar meeting on the 17th of June, 1885, *Jordan* again being present, the minutes of the last meeting were read and confirmed, and it was resolved that the seal of the company should be affixed to the agreement of the 25th of April, 1885, and to the deed of assignment of the lease of the premises in *White's Ground, Bermondsey*, and that the seal of the company should be attached to thirty-five debentures of £100 each to be given to *Jordan* and *Commans* in part payment of their cash purchase-money of £6500.

The deed of assignment referred to in the minute of the 17th of June, 1885, was a deed whereby the leasehold premises mentioned in the agreement of the 25th of April, 1885, were assigned to the company. It was executed by *Jordan* and by the company under their seal. It recited the original lease of the premises, the assignment of them to *Jordan*, the assent of the lessor to the present assignment, and that *Jordan* had agreed to sell the premises to the company at the price of £200. The assignment was expressed to be made in pursuance of that agreement.

After the assignment was executed, the company entered into possession of the leasehold premises and carried on their business thereon.

In pursuance of the last-mentioned resolution the directors issued to *Jordan* and *Commans*, or their nominees, thirty-five mortgage debentures of £100 each under the seal of the company, bearing interest at 6 per cent. per annum, and which were expressed to be a charge upon the company's "undertaking and all its property both present and future, including its capital for the time being uncalled."

The seal of the company was never in fact affixed to the agreement of the 25th of April, 1885.

On the 13th of September, 1886, the holders of the thirty-five debentures gave notice calling in the principal money thereby secured.

On the 16th of September, 1886, a petition for the winding-up of the company was presented; on the 6th of November, 1886, a winding-up order was made, and an official liquidator was subsequently appointed.

By an indenture dated the 3rd of March, 1887, and made between *Jordan* of the first part, the company of the second part, and the liquidator of the third part, reciting the agreement of the 25th of April, 1885, the incorporation of the company, that the last-mentioned agreement was duly adopted by the company on the 27th of May, 1885, that the payment of cash and allotment of shares to *Jordan* as afterwards varied was agreed to by the company, and the grant of the letters patent, *Jordan* at the request of the liquidator assigned his interest in the letters patent to the company.

This action was brought by one of the holders of the thirty-five debentures on behalf of himself and the other debenture holders to establish and enforce their securities, and on the 31st of March, 1887, on the application of the Plaintiff and *Jordan* an order was made in the action and in the winding-up of the company that the following issues be tried: (1) whether any and which of the thirty-five debentures were invalid; and (2) what property of the company was charged by such debentures.

The issues now came on for trial.

It appeared that the debenture-holders were all directors of the company when they took their debentures.

Byrne, Q.C., and *Spence*, for the Plaintiff, *Jordan*, and other debenture holders:—

By the constitution of the company the directors had full power to adopt the agreement of the 25th of April, 1885, with modifications. They did adopt the agreement with the modification that *Jordan* was to accept payment of £3500 in debentures instead of cash; and thereby the company entered into a new contract with *Jordan* on the terms of the agreement as so modified. The existence of such a contract is further evidenced by the facts that the company and the liquidator have respectively accepted assignments of the property comprised in the agreement, and that the company has had possession of the leasehold property and carried on business thereon. Such cases as *In re Empress Engineering Company* (1) and *In re Northumberland Avenue Hotel Company* (2) are distinguishable. There was there no sufficient evidence from which the Court could infer that a new contract had been entered into.

[KAY, J., referred to *Gregory* v. *Mighell* (3) and *Wilson* v. *West Hartlepool Railway Company* (4).]

It follows that there was a *bonâ fide* debt due from the company at the time when the debentures were issued, and that they were therefore validly issued.

[They referred also to *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (5).]

Millar, Q.C., and *L. H. Rosenthal*, for the Liquidator:—

The debentures were not validly issued, because at the time of

(1) 16 Ch. D. 125.
(2) 33 Ch. D. 16.
(3) 18 Ves. 328.
(4) 2 D. J. & S. 475.
(5) 22 Ch. D. 61.

their issue there was no existing debt due from the company. The agreement of the 25th of April, 1885, made before the company was formed did not bind the company, but they acted throughout in the erroneous belief that it was binding on them. There is no evidence from which the Court can infer any intention on their part to enter into a new contract. *In re Northumberland Avenue Hotel Company* (1) is distinctly in point: see also the observations of *Jessel*, M.R., in *In re Empress Engineering Company* (2).

Even if there was an existing debt, the directors had no power, without the assent of a general meeting of the company, to issue debentures beyond the amount of £1000. The debentures therefore can only be valid to that extent. The circumstance that they were issued in respect of a pre-existing debt cannot affect the question: *In re Inns of Court Hotel Company* (3); *Landowners' West of England and South Wales Land Drainage and Inclosure Company* v. *Ashford* (4); *Irvine* v. *Union Bank of Australia* (5).

The debentures are invalid so far as they include unpaid capital: *Bank of South Australia* v. *Abrahams* (6); *Stanley's Case* (7).

[They referred also to *Wright* v. *Horton* (8).]

Byrne, in reply:—

The general power of borrowing conferred on the directors by the memorandum of association and art. 94 of the articles of association is not cut down by the special and limited power contained in art. 95. In the cases last cited the directors had merely power to charge the "property" or "funds" of the company. Here they have power to charge the "properties and rights" of the company, including therefore the right to call up unpaid capital.

KAY, J. (after referring to the memorandum and articles of association of the company as above set out, and stating the facts of the case, and observing that there could be no kind of doubt that the leasehold premises were assigned by *Jordan* to the company in pursuance of the arrangement made by the directors, of whom he was one, in his presence and with his assent, that the company should adopt the agreement made by *Jordan* before the company had been formed, continued :—)

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(1) 33 Ch. D. 16.
(2) 16 Ch. D. 128.
(3) Law Rep. 6 Eq. 82.
(4) 16 Ch. D. 411.
(5) 2 App. Cas. 366.
(6) Law Rep. 6 P. C. 265.
(7) 4 D. J. & S. 407.
(8) 12 App. Cas. 371.

The liquidator now comes here and in the name of the company, says: "It is quite true that I have got all this property"—it is very nearly, I am told, all the property comprised in the agreement of the 25th of April, 1885—"it is quite true that the directors of the company, on the 27th of May, 1885, adopted the agreement by resolution, Mr. *Jordan* being present and assenting; and it is quite true that the agreement with Mr. *Jordan* was varied by inducing him to take instead of cash a certain amount of his payment in debentures, and thereupon these debentures were issued; now, with this deed of assignment in my hand, which I have myself obtained from Mr. *Jordan* since the winding-up, I say that the whole thing was void, and that these debenture-holders are entitled to nothing." Well, one would condemn that, if it were the act of an individual, rather strongly. It is said that companies have no conscience; but the liquidator of a company might as well have a conscience, when acting in the character of an officer of this Court. This Court does not allow itself to act dishonestly, and a more thoroughly dishonest proceeding than that would be, I cannot well imagine.

But it is said that I am bound by authority. Now, how stands the law? It has been settled by numerous cases, that where a company takes possession of landed property under a parol agreement, without having executed any document under its seal, or any writing signed by an agent (such as would satisfy the well-known provisions of the 37th section of the *Companies Act*, 1867), such company may be just as much bound by the equitable rule of part performance, although it is a corporation, as an individual may be. There are many authorities on that point. They are all collected in the work of Lord Justice *Fry* on Specific Performance (1), but I will refer to one case, to which I called the attention of counsel during the argument, which contains the expression of the opinion of one of the most eminent Judges we have had of late years—the late *Turner*, L.J. In the case of *Wilson* v. *West Hartlepool Railway Company* (1) that learned Judge says (2): "It was contended on their part that companies are not bound by acts of part performance, and that the acts which have been done in this case furnish no equity against the defendants, because they are acts to the prejudice of the defendants only, and not of the plaintiff; but I cannot accede to either of these arguments. Neither of them is, in my opinion, consistent with the principle on which this Court proceeds in cases of part performance. The Court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to a fraud, ought not to be so considered if done by a company, nor can I say that it is no prejudice to the plaintiff to have been permitted to take possession on the faith of an agreement, and afterwards to be held liable to be treated as a trespasser and turned out of possession on the ground that there was no agreement. There is authority for saying that in the eye of this Court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it." That is a very distinct decision which, so far as I know, has never been departed from, that the rule of equity that part performance will take a case out of the *Statute of Frauds* applies to an incorporated company, and that an incorporated company which comes within that doctrine of part performance is just as much bound by it as if it were an individual. In the same case there is (3) a summary of another part of the law to which I have often had occasion to refer: "Where possession has been given upon the faith of an agreement, it is I think the duty of the Court, as far as it is possible to do so, to ascertain the terms of the agreement and to give effect to it."

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(1) 2nd Ed. p. 280.

But, then, it is said that here there was no agreement between the company and Mr. *Jordan*. There was an agreement between Mr. *Jordan* and a person who professed to be trustee for the company before the company was formed. But that agreement, it is said, is completely null and void, and could not be ratified by the company, and under the circumstances the Court cannot infer that there ever was an agreement, either parol or otherwise, between Mr. *Jordan* and the company. The authorities for that are some well-known cases, all of which, I believe, proceed upon the decision in *Kelner* v. *Baxter* (1). The case mainly relied upon is *In re Northumberland Avenue Hotel Company* (2), but before proceeding to consider that, I will notice another in which the decision was in favour of the company—*In re Empress Engineering Company* (3). I notice that for this reason, that the late Master of the Rolls, Sir *George Jessel*, in giving judgment said: "The contract between the promoters and the so-called agent for the company of course was not a contract binding upon the company, for the company had then no existence, nor could it become binding on the company by ratification, because it has been decided, and, as it appears to me, well decided, that there cannot in law be an effectual ratification of a contract which could not have been made binding on the ratifier at the time it was made, because the ratifier was not then in existence." But he adds this: "It does not follow from that that acts may not be done by the company after its formation which make a new contract to the same effect as the old one, but that stands on a different principle." That is to say, recognising entirely the well-settled law that a company is bound by acts of part performance, and that when you find a company in possession of the property of another person you are bound, if you can, to refer that possession not to trespass but to contract, and as *Turner*, L.J., said in the words I have quoted, to find out, if you possibly can, what that contract is, the Master of the Rolls excepts from the judgment which he is giving, cases of that kind where there have been acts of a company from which you can infer, and from which you ought to infer, that there was a contract by the company after its formation.

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(1) 2 D. J. & S. 475.
(2) 2 D. J. & S. 492.
(3) 2 D. J. & S. 494.

Now the case mainly relied upon, namely, *In re Northumberland Avenue Hotel Company*, is certainly one of very considerable difficulty; but in order to ascertain whether it binds me here to hold that there was no contract, I must see whether the facts were the same. In the first place, I must observe that the question whether there was a contract between this company and Mr. *Jordan* is a question, not of law, but of fact. Am I bound because in one case the Court, upon evidence before it, came to the conclusion as a matter of fact that there was no binding contract, to hold that in this case there was no such contract? The finding of a jury upon one set of facts does not bind a jury upon another set of facts; nor does the finding of any Court bind another Court where the facts are not the same. In the case of *In re Northumberland Avenue Hotel Company* (1) the facts were these. *Wallis* having negotiated with the Metropolitan Board of Works for a grant to him of a lease of certain land for eighty years at a large rent, upon his erecting certain buildings within a specified time, entered into an agreement in writing with them on the 2nd of October, 1882. But before he had got his own agreement, an agreement dated the 24th of July, 1882, had been entered into between one *Nunneley* and *Doyle*, "as trustee for and on behalf of an intended company, to be called 'the *Northumberland Avenue Hotel Company, Limited*,'" which recited that *Nunneley*, as agent for and on behalf of *Wallis*, had agreed to grant to the company, and that *Doyle*, on behalf of the company, had agreed to take, an underlease subject to certain conditions for eighty years, less one day of the original lease. The agreement contained stipulations like those in ordinary building agreements, and by clause 23, reciting that *Wallis* was negotiating for further plots of land, the company purported to agree (for they were not then in existence) to become lessees of them at such rent and upon such conditions as might be agreed upon between them and *Wallis*. So far that case was quite like the present case. The contract to which I have just referred was made before the company was formed; of course it could not bind an unformed company, which was formed afterwards. The company was formed the next day—the 25th of July. The agreement was not mentioned in the memorandum of association, but the 2nd clause of the articles of association purported to adopt it, and provided that the company should carry it into effect, subject to any modification which might be agreed upon

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(1) Law Rep. 2 C. P. 174.

(2) 33 Ch. D. 16.

(3) 16 Ch. D. 125, 128.

(1) 33 Ch. D. 16.

between *Nunneley* and the company. The company after their incorporation did not enter into any further agreement in writing with *Wallis*, but they acted on the agreement of the 24th of July, 1882, that is to say, the agreement made before the company was formed. The company took possession of the ground, and spent £40,000 in building upon it. There was no note or memorandum of contract with *Wallis*, or seal on behalf of the company after their incorporation. *Wallis* afterwards commenced an action against the company for specific performance of the 23rd clause of the agreement by which they were to take certain other plots of land from him. This action was compromised, and the company agreed to accept a lease of the additional ground. That agreement did not refer to the rest of the contract between them. The company paid the rent to *Wallis*, and several resolutions were passed, with the assent of *Wallis*, purporting to modify some of the terms of the agreement of the 24th of July, 1882; but none of these modifications were carried into effect by means of any written document.

Now I confess that last part of the case does seem to me to create very considerable difficulty. If the company did agree with *Wallis* to modify the original agreement I should have thought on the face of it—though of course I am wrong—that there was enough evidence to justify the Court in inferring that they had entered into an agreement with *Wallis* to the same effect as that original agreement, especially when you couple with that the fact that they had taken possession of the land. However, what actually occurred was this: afterwards, the company did not get sufficient capital to enable them to continue their works, and *Wallis* served them with notice to re-enter. On the 13th of May, 1884, the Metropolitan Board of Works, the ground landlords, the original lessors to *Wallis*, put an end to the agreement with *Wallis*, so that the property was entirely recovered under a title paramount by the Metropolitan Board of Works, and they resumed possession. Then the company was wound up, and *Wallis* became bankrupt, and the trustee in bankruptcy of *Wallis* took out a summons to be admitted a creditor for damages for breach of the agreement. The thing was gone, and the Court had to consider whether there had been a binding agreement under the circumstances between *Wallis* and the company, and such breach of it as entitled his trustee in bankruptcy to prove for damages against the company. These are the material parts of the judgments. Lord Justice *Cotton* said (1): "But it is said that we ought to hold that there was a contract entered into between the company and *Wallis* on the same terms (except so far as they were subsequently modified) as those contained in the contract of the 24th of July, 1882. In my opinion that will not hold. It is very true that there were transactions between *Wallis* and the company in which the company acted on the terms of that contract entered into with *Wallis* by the person who said he was trustee for them. But why did the company do so? The company seem to have considered, or rather its directors seem to have considered, that the contract was a contract binding on the company. But the erroneous opinion that a contract entered into before the company came into existence was binding on the company, and the acting on that erroneous opinion, does not make a good contract between the company and Mr. *Wallis*, and all the acts which occurred subsequently to the existence of the company were acts proceeding on the erroneous assumption that the contract of the 24th of July was binding on the company. In my opinion that explains the whole of these transactions. The case is entirely different from those cases which have been referred to, where the Court, finding a person in possession of land of a corporation, and paying rent, has held that there was a contract of tenancy. There was no mode of explaining why the occupier was there, except a tenancy, unless he was to be treated as a trespasser. The receipt of rent by the corporation negatived his being a trespasser, and it was therefore held that there was a tenancy. Here we can account, and in my opinion we ought to account, for the possession by the company, and for what it has done, by reference to the agreement of the 24th of July, which the directors erroneously and wrongly assumed to be binding upon them." Then Lord Justice *Lindley*, said that he was of the same opinion, and added (2): "The more closely the case is investigated the more plainly does it appear that there never was any contract between the company and *Wallis*." That was a finding, as I have said, of fact. Now, am I bound to find that there never was any contract as a result of the facts proved in the present case? Here there was passed in Mr. *Jordan's* presence a resolution of the board of directors, to which he was a party, adopting this agreement. There was the conveyance by Mr. *Jordan* of the leasehold property comprised in the agreement, and the seal of the company was affixed to it—clearly and obviously carrying out the contract between Mr. *Jordan* and the company, which the company by that adoption seem to me distinctly to have made. There were no such facts as these in the case of *In re Northumberland Avenue Hotel Company* (1). Besides all that, I have here the payment of part of the price in debentures. That was a variation of the contract made by distinct agreement with Mr. *Jordan* after the passing of a resolution for the issue of the debentures, contemporaneously with the deed by which Mr. *Jordan* assigned part of the property to the company. After the winding-up the liquidator took an assignment of all the rest of the property of which he could possibly get an assignment, in pursuance of the very same arrangement. Now he comes to the Court and asks the Court to say that there never was a contract between the company and Mr. *Jordan*. He says, "True, I have taken from Mr. *Jordan* everything I could possibly get from him: the company took an assignment of the leasehold premises which they have held ever since; I have treated all these as assets of the company, and I now turn round and say that there never was such an agreement." Such a course of conduct would be, as I have characterized it during the argument, the most flagrant dishonesty. It is saying "you shall not be paid for the property at all." I should not hold that unless I were bound by authorities very much more stringent than those which have been cited. Nor do I think that any branch of the Court would hold anything of that kind. In my opinion it is very clear that there was a contract between Mr. *Jordan* and the company. That is the only possible inference I can draw from the facts which I have stated. Therefore, so far as that matter goes, I think it is perfectly plain that the money for which these debentures were issued in payment was due at the date when the debentures were issued, because I

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(1) 33 Ch. D. 20.

(2) 33 Ch. D. 21.

(1) 33 Ch. D. 16.

am quite clear that this contract existed on the 17th of June, 1885, and indeed on the 27th of May, 1885, when Mr. *Jordan* agreed with the other directors that the contract should be adopted as between himself and the company.

Then I have to consider certain other points which have been raised. One of them is this. It is said that these debentures, on the face of them, purport to bind the undertaking and all the property of the company both present and future, including the capital for the time being uncalled, and it is said that that is invalid. The authority cited in support of that proposition is the *Bank of South Australia* v. *Abrahams* (1), in which, there being a power to directors to charge the property of the company, it was held that that did not authorize them to include in such charge future calls or, in other words, the unpaid capital of the company. In *Stanley's Case* (2), which was there approved, there was a power to charge the property and funds of the company. But in the present case the terms of the memorandum of association, which as Lord *Cairns* said, in *Ashbury Railway Carriage and Iron Company* v. *Riche* (3), is the charter of the company, were these: "To borrow money on behalf of the company, and to mortgage, sell, and dispose of all or any part of the company's properties and rights." It is one thing to say that the power of mortgaging the property of a company does not authorize a mortgage of that which at the time was not its property, but might thereafter become its property; but it is quite another thing, and it is going much further, to say that a power to mortgage the rights of a company does not authorize a mortgage of a right which the company has by contract to call up the uncalled capital. In my opinion, these debentures were framed rightly enough, and do include the uncalled capital.

Now it has not been denied that to the extent to which there was a *bonâ fide* debt, it was legitimate to issue debentures to the creditor, and to treat that as a borrowing. That has been decided in several of the cases that were cited, as for instance *In re Inns of Court Hotel Company* (4) and *Landowners West of England and South Wales Land Drainage and Inclosure Company*

(1) Law Rep. 6 P. C. 265.
(2) 4 D. J. & S. 407.
(3) Law Rep. 7 H. L. 653, 668.
(4) Ibid. 6 Eq. 82.

v. *Ashford* (1). I have no doubt that is the law, and the reason for it is quite clear and obvious. If you might not issue debentures to a creditor under a borrowing power it would come to this, that you would have to issue debentures to the bankers, or to somebody else, who would advance the money, and then pay that money over to the creditor, or issue debentures to the creditor himself, he lending you money first and then you paying it back to him. Of course it is obvious that such a roundabout proceeding as that need not be resorted to, and the Court looks to the substance of the matter. Therefore the issue of debentures under the borrowing power to a person who is already a creditor of the company may well be treated as a proper issue of debentures.

But then a very much more serious question has been raised, and that is this. These debentures were issued by the directors, and it is said that the power of the directors to issue debentures is limited, and the limit is very plain when you look at article 95, which is as follows. The directors are empowered "to borrow from time to time on behalf of the company such sums of money, not exceeding in the whole at any one time £1000, as the directors think necessary or advisable, also to raise such further moneys as may be authorized from time to time by resolution of any general meeting of shareholders summoned for the purpose." So that when the directors have borrowed up to £1000, and there are existing loans unpaid to that amount, the borrowing power of the directors is exhausted, and no more can be borrowed without the authority of a general meeting of shareholders. Then the next clause is, "To secure the repayment of any moneys so borrowed, together with the interest, by debentures." Therefore the directors could only issue valid debentures for moneys borrowed by themselves, without the assent of a general meeting, to the extent of the borrowing power. Beyond that, in order to authorize themselves to borrow and to issue debentures, there must be the assent of the general meeting.

Now in this case, unfortunately for the holders of these debentures, they are all directors, and therefore the well-known authorities which make it unnecessary to see whether the internal regulations of a company have been observed or not do not apply;

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(1) 16 Ch. D. 411.

because, of course, the directors must be taken to know that the internal requirements of the company had not been observed in the case of these debentures. Accordingly, I am very sorry to say that I cannot treat the debentures as valid to the extent of more than £1000. How that sum is to be allotted between the different parties I do not know. I have heard nothing on that point. I must treat the issue of the debentures as being invalid within the knowledge of the directors beyond the amount of £1000. There must be a declaration that the first ten only of the thirty-five debentures, taking them according to their numbers, are valid.

Solicitors: *Keddey Ray Fletcher; Saul Solomon.*

C. C. M. D.

In re EXCHANGE DRAPERY COMPANY.

KAY, J.
1888
March 2.

Company—Winding-up—Shareholder—Advances beyond Calls—Surplus Assets—Interest on Advances—Advanced Shareholders—Ordinary Shareholders—Distribution.

Where, upon the incorporation of a limited company, it is provided that a shareholder advancing in respect of any of his shares sums beyond the amount actually called and paid up shall receive interest on such advances, such advanced shareholder is entitled, in the event of the company being wound up, and there being surplus assets of the company after payment of debts, not only to be repaid the amount of his advances together with interest thereon up to the date of the commencement of the winding-up, but also further interest from that date up to the repayment of the advances.

The articles of association of a limited company, whose nominal capital was divided into £10 shares, ratified an agreement which had been entered into between the vendors and the promoters, by which it was agreed that the vendors should be paid partly in fully paid-up shares, and that the holders of vendors' shares should be entitled to dividends upon so much thereof as should be equal to the amount for the time being paid up on the ordinary shares, and also to interest at 5 per cent. per annum upon such amount of the nominal value of the vendors' shares as should be equal to the amount for the time being not called up on the ordinary shares.

The vendors' shares were duly issued as fully paid up, but on the ordinary shares £7 only per share was called and paid up. On the company subsequently going into voluntary liquidation, the assets shewed a surplus after payment of debts. Out of this surplus the liquidator returned to the holders of vendors' shares £3 per share, thus equalizing the amounts paid up on those and the ordinary shares.

The holders of vendors' shares also received out of the surplus assets, on the £3 per share so returned, interest at 5 per cent. per annum up to the date of the commencement of the winding-up.

Upon the question whether they were entitled to further interest from that date :—

Held, that the meaning of the agreement was that the amount paid up on the vendors' shares beyond the amount paid up on the ordinary shares should be treated as an advance to the company carrying interest at 5 per cent. per annum, and that to put the "advancing" shareholders on an equality with the ordinary shareholders in dealing with the surplus assets in the winding-up the liquidator must give effect to that agreement by not only repaying the £3 per share, as capital advanced, with interest to the date of the commencement of the winding-up, but also by paying them further interest from that date up to the date of the repayment of the £3 per share; and that the remaining assets should be distributed among both classes of shareholders *pari passu*.

THE *Exchange Drapery Company* (*Limited*) was incorporated in 1872 for the purpose of taking over and working a drapery establishment in *Sheffield*, the nominal capital being £45,000 in 4500 shares of £10 each.

The articles of association set out an agreement, made on the 1st of August, 1871, between the vendors and the promoters of the company, by which, after provisions that the promoters should form a company under the above name for purchasing the vendors' business, and that the vendors should sell to the company their business premises and goodwill, it was agreed (clause 8) that the total price to be paid by the company to the vendors should be £20,500, payable (clause 10) as to £15,000 by the issue of 1500 fully paid-up shares, and as to the residue by cash instalments, the unpaid purchase-money to carry interest at 5 per cent. per annum.

Clause 11 provided that the 1500 shares to be allotted to the vendors should be called and marked as "vendors' shares," and that "the vendors or other the holders of these shares shall be entitled to dividends upon so much thereof as shall be equal to the amount which for the time being shall be paid up upon the ordinary shares of the company, and shall be entitled also to interest after the rate of 5 per cent. per annum upon such amount of the nominal value of the said shares called 'vendors' shares' as shall be equal to the amount for the time being not called up upon the said ordinary shares."

Clause 12 provided that the 1500 shares should be divided between the vendors individually as they should direct, and that the "dividends" on such shares and the "interest" for the time being payable in respect thereof under clause 11 should not be payable for the first five years, "unless and until the holders of the other or ordinary shares in the company shall have received a dividend equal to £10 per cent. in each year of the said term of five years on their paid-up capital for the time being."

Art. 4 of the articles of association ratified the agreement, and art. 20 empowered the directors to receive from any member of the company all or any part of the money unpaid upon any share or shares held by him beyond the sums actually called for, and upon the money so received in advance to allow interest at such rates and times as they and the member paying in advance should agree upon.

Of the 4500 £10 shares constituting the capital of the company the 1500 vendors' shares were duly allotted as fully paid up pursuant to the agreement, and the remaining 3000 shares were issued to the public, but only £7 per share was called up thereon.

In 1887 resolutions were passed for the voluntary winding-up of the company, and a liquidator was appointed. The liquidator realized all the assets of the company, and, after making due provision for all its debts and liabilities and the expenses of the winding-up, there remained a considerable surplus for distribution among the shareholders. Out of this surplus the liquidator returned to the holders of vendors' shares the sum of £3 per share, thus reducing the amount paid up upon those shares to £7 per share, the amount paid up upon the ordinary shares. Under the provisions of clause 11 of the agreement, interest at 5 per cent. per annum up to the 13th of April, 1887, the date of the commencement of the winding-up, had been paid to the holders of vendors' shares in respect of the £3 paid up upon their shares beyond the amount called up upon the ordinary shares.

The question then arose as to whether the owners of vendors' shares were entitled to a further payment of interest from the commencement of the winding-up to the date of the refunding to them of the £3 per share. The question was raised upon a motion by the liquidator asking "that it might be determined whether in the distribution of the surplus assets of the company the holders of the 1500 vendors' shares, upon which the full sum of £10 was credited as paid, were entitled (after receiving £3 per share upon each of their shares with interest thereon to the 13th of April, 1887), before any repayment was made in respect of the other shares of the company upon which £7 only was credited as paid, to be paid interest on the said sum of £3 at 5 per cent. per annum from the 13th of April, 1887, until payment of the said sum of £3 per share, or during any and what period."

Theobald, for the Liquidator:—

The holders of vendors' shares must be treated as having paid £3 per share in advance of calls, and the question is, whether on receiving back that £3 per share, out of the surplus assets of the company, they are not also entitled to a further payment for interest on the £3 from the commencement of the winding-up. Under clause 11 of the agreement between the vendors and the promoters of the company the holders of vendors' shares are entitled to interest at 5 per cent. per annum upon such amount of the nominal value of their shares as shall be equal to the amount uncalled-up on the ordinary shares, that is, on £3 per share; and that would seem to constitute a debt from the company to the holders of vendors' shares which is properly payable out of the assets of the company: *Dale* v. *Martin* (1).

Vernon R. Smith, for a holder of ordinary shares:—

The proposal is that interest shall be paid out of *corpus*, but the meaning of the agreement is, as shewn by clause 12, that the interest shall be paid out of profits only, "interest" being equivalent to "profits." The holders of vendors' shares are not entitled in the winding-up to claim what is in the nature of a preferential dividend. On the breaking-up of a company any surplus assets are divisible rateably among the shareholders: *Ex parte Maude* (2).

(1) 11 L. R. Ir. 371.

(2) Law Rep. 6 Ch. 51.

KAY, J.:—

I think that for the purpose of the present application I must treat the 11th clause of the agreement as being a binding clause, and the question is what is the meaning of it? It is a provision that certain persons who have paid up the full £10 a share, the ordinary shares not having been paid up in full, shall receive, in respect of the amount which they have paid beyond the ordinary shareholders, interest, and the interest is given in these terms:— [His Lordship then read the 11th clause, and proceeded:—] *Primâ facie* that means that the amount paid up on the vendors' shares beyond the amount paid on the ordinary shares shall be treated as an advance to the company, carrying interest at 5 per cent. What has happened is that the company has been wound up, and all the ordinary creditors have been paid. I quite agree that no shareholder can come and say, "I will prove for interest in competition with and as against ordinary outside creditors." The law of partnership, which has been adopted in the winding-up of companies, is against that; but then, the creditors having been paid, the duty of the Court is to adjust the rights of the various contributories among themselves.

Now, it appears that the creditors have been paid, and that there is a surplus of assets, which surplus it is proposed to apply first in paying back to the advancing shareholders, as I will call them, the amount advanced beyond the sum paid on the ordinary shares. The question is whether the payment back of the £3 per share will put the advancing shareholders on an equality with the ordinary shareholders. Having regard to the contract, if they receive back nothing but their capital, that will by no means put them on an equality with the ordinary shareholders. If the meaning of the agreement is to put all the shareholders on an equality, it is the duty of the Court, in dealing with the surplus assets, to carry out that agreement, and as far as possible to preserve and effectuate that equality. I do not see how that can be done except by paying back to the advancing shareholders the £3 capital, and then allowing them, out of any moneys that remain, interest at 5 per cent. on the capital so paid back from the date of the commencement of the winding-up to the date of the payment back. When that has been done all the shareholders will

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be on exactly the same basis. Whatever assets remain will then be distributed *pari passu* among all the shareholders.

I accordingly make an order for payment of interest on the £3 paid back on the vendors' shares, and I allow the costs of all parties out of the assets.

Solicitors: *Pattison, Wigg, & Co.*, agents for *Broomhead, Wightman, & Moore, Sheffield*; *Pritchard & Sons*, agents for *Webster & Styring, Sheffield.*

G. I. F. C.

KAY, J.
1888
March 14, 22.

In re DUGDALE.
DUGDALE *v.* DUGDALE.

[1888 D. 38.]

Will—Absolute Gift—Executory Gift—Restraint on Alienation—Condition—Repugnancy.

A testatrix gave certain real and personal estate "upon trust for my third son, *J.*, his heirs and assigns; but if my said son should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him" should go and be held in trust for his wife, or, if no wife then living, for his children equally.

J. survived his mother, and was still living, a bachelor:—

Held, that he took an absolute interest under the gift, and that the attempted executory gift over was void for repugnancy.

Conditional gifts by way of restraint on alienation, discussed.

ELIZABETH DUGDALE, who died in 1866, by her will dated in 1865, devised and appointed certain real and personal estate "upon trust for my third son, *James Boardman*, his heirs and assigns; but if my said son, *James Boardman*, should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son, *James Boardman*, shall absolutely cease and determine, and the estates, hereditaments, money and premises hereinbefore limited in trust for him, and also any and every other share of property, real and personal, which may survive or accrue to him under the trusts of this my will, and whereof, by reason or in consequence of any such act, deed or thing as aforesaid, or by operation of law, he would be deprived in his lifetime of the personal beneficial enjoyment, shall go and be held in trust" for his wife, or, if no wife then living, for his children equally, their heirs, executors, administrators, and assigns, and if there should not be any wife or child living, then, during so much of his life as there should be a want of any such wife or child, the rents and income should be accumulated for the benefit of any future wife or children, and so much as could not legally be accumulated should be paid to the persons who under the trust thereinafter declared would be entitled thereto if *James Boardman* was not living; "and if he shall die without leaving any issue of his body him surviving, the estates, hereditaments, money and premises hereinbefore limited in trust for him, with any and every such surviving or accruing share as aforesaid, shall go and be held in trust for" such of the testatrix's other issue as he should by deed or will appoint, and in default, in trust for her other children equally, their respective heirs, executors, administrators, and assigns; and the testatrix declared that each of her sons should during the continuance of the trust thereinbefore contained for his benefit respectively have the letting and full management of the hereditaments limited in trust for him without the intervention of the trustees.

The will had previously contained similar provisions for two other sons of the testatrix.

James Boardman Dugdale survived his mother, and was a bachelor. This was an originating summons taken out by him against the testatrix's other children or their representatives, and the trustees of the will, claiming a declaration that he was entitled absolutely to the property devised and appointed to him, upon the ground that the executory devise over was repugnant and void.

Farwell, for the Plaintiff:—

The rule is well settled, that where an absolute interest is once given, a gift over, if the legatee disposes of his interest, is void for repugnancy: *Bradley* v. *Peixoto* (1); *In re Machu* (2).

The gift over on death without issue is only part of the gift over on alienation. Had it been otherwise the testatrix would have used the word "but" and not "and" in introducing it.

A. J. Chitty, for the Defendants:—

The Plaintiff is not entitled absolutely to the gift. The alienation on which the gift over arises is limited to his life, which distinguishes the case from *Bradley* v. *Peixoto*. In *In re Machu* the gift over was after a devise of the legal estate in fee: here the legal estate is in the trustees, and the gift over is an executory limitation. Such a limitation is good, provided it does not entirely prevent alienation. The rules applicable to a condition in restraint of alienation are the rules applicable to the present case. A condition restraining alienation is good if limited in respect of time. On this point I rely on the opinion of the "eminent conveyancer" quoted in *Churchill* v. *Marks* (3) and the *dicta* of Sir *G. Jessel* in *In re Macleay* (4). Again, the gift over on involuntary alienation is good, and is severable from the gift over on voluntary alienation. In any case, the gift over on death without issue is independent of the previous gift over on alienation, and is co-ordinate with it. The testatrix has used "but" and "and" interchangeably in other parts of the will.

Farwell, in reply, cited *Brandon* v. *Robinson* (5).

[KAY, J., referred to *In re Rosher* (6) and *Rochford* v. *Hackman* (7).]

1888. March 22. KAY, J. (after reading the gift, continued):—

James Boardman Dugdale claims this property upon the ground that the executory devise which I have read is repugnant and void.

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(1) 3 Ves. 324.

(2) 21 Ch. D. 838.

(3) 1 Coll. 441, 445.

(4) Law Rep. 20 Eq. 186, 189.

(5) 18 Ves. 429.

(6) 26 Ch. D. 801.

(7) 9 Hare, 475.

There is no doubt that a condition against alienation is void: *Co. Litt.* (1).

The difference between a condition, properly so called, and a conditional limitation or an executory devise is that, in the case of a condition, the estate is to revert to the grantor or his heirs; in the other cases it is limited over to other persons. But even in the case of a condition the power of alienation may be restricted, though it cannot be entirely taken away. For example, a condition not to alien "to such an one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away all powers of alienation from the feoffee, &c., then such condition is good": *Litt.* (2).

It has been said that a total restriction of alienation for a limited time may be good. During the argument in *Churchill* v. *Marks* (3) an eminent conveyancer, in answer to a question put to him by the Court, stated his opinion to be, that a gift to *A.* in fee, with a proviso that if *A.* aliens in *B.'s* lifetime the estate shall shift to *B.*, is valid.

Such a limitation might not deprive *A.* altogether of the power of alienation, because he might outlive *B.*, and after *B.'s* death his power of alienation would not be interfered with. But it is to be observed that there is no decision to this effect, and the late Mr. *Waley* in a note, p. 88, of the 2nd edition (p. 111, 3rd edition), 3rd vol. of *Davidson's* Conveyancing, to which my attention has been called, states his opinion that this doctrine is doubtful.

In *In re Macleay* (4) there was a devise of real estate to one in fee "on the condition that he never sells it out of the family." This was held to be a good condition by Sir *G. Jessel*, M.R., it being a limited restriction on alienation. The decision was dissented from by the late Mr. Justice *Pearson* in *In re Rosher* (5), where the devise was to the testator's son in fee, with a proviso that if the son, his heirs or devisees should desire to sell the same, or any part thereof, in the lifetime of the testator's wife, she should have the option to purchase at £3000 for the whole,

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(1) 223 a.

(2) Sect. 361.

(3) 1 Coll. 441, 445.

(4) Law Rep. 20 Eq. 186.

(5) 26 Ch. D. 801.

KAY, J.
1888
In re DUGDALE. DUGDALE *v.* DUGDALE.

and at a proportionate price for any part. £3000 was much less than the value of the estate; and it was held that the proviso amounted to an absolute restraint on alienation, and was therefore void, although the restriction was limited to the life of the testator's widow.

It is clearly settled that a gift over upon an attempt to alien an absolute interest previously given is as void as a condition. This is shewn by the cases of *Bradley* v. *Peixoto* (1); *Ross* v. *Ross* (2); *Holmes* v. *Godson* (3), in which Lord Justice *Turner* stated that the law is the same both as to gifts of real and personal estate; and *Shaw* v. *Ford* (4).

In *Fearne's* Contingent Remainders (5) the difference between a conditional limitation or executory devise and a contingent remainder is discussed, the illustration given being that a limitation to the use of *A.* and his heirs till *C.* returns from *Rome*, and after the return of *C.*, to the use of *B.* in fee, is, in a deed, a conditional limitation, in a will, an executory devise. But a limitation to the use of *A.* until *C.* returns from *Rome*, and after the return of *C.*, to the use of *B.* in fee, is a contingent remainder to *B.*, the whole fee not being limited to the use of *A.* as in the former case, but only a particular estate to endure till the return of *C.*, which being an uncertain period such particular estate is a freehold, and consequently the limitation to *B.* and his heirs is a contingent remainder.

In the same work (6) it is said that limitations defeating a portion of an estate previously given "are properly termed conditional limitations, to distinguish them on the one hand from conditions, of which only the grantor or his heirs can take advantage, and on the other from remainders, in the strict and proper sense of the word as above defined: and though these conditional limitations are not valid in conveyances at common law, yet, within certain limits, they are good in wills and conveyances to uses."

In accordance with the doctrine as thus stated by *Fearne* there are a series of decisions, of which *Brandon* v. *Robinson* (7), *Webb*

(1) 3 Ves. 324.

(2) 1 Jac. & W. 154.

(3) 8 D. M. & G. 152.

(4) 7 Ch. D. 669.

(5) 10th Ed. pp. 12, 15.

(6) Ibid. 15.

(7) 18 Ves. 429.

v. *Grace* (1), *Rochford* v. *Hackman* (2), and *Joel* v. *Mills* (3) are examples, which decide that if real or personal estate be given to *A.* for life, with remainder to *B.* absolutely, with a proviso that, if *A.* should attempt to assign, his life estate should cease, such a proviso is read as a limitation to *A.* during his life or until he should attempt to assign, and upon that event, or after his death, over, and such a limitation is held to be valid.

The result is that a limitation, by way of use or in a will, to *A.* until he attempt to alien, and on that event to *B.* and his heirs, is valid, *A.* taking an estate of freehold which only endures by the terms of the limitation until the attempted alienation, and *B.* taking a contingent remainder. But a limitation to *A.* "and his heirs," but if he attempt to alien, to *B.* in fee, is an invalid gift over. So also where the limitation is to *A.* "and his heirs" until he attempt to alien, and thereupon to *B.* and his heirs. This is as clearly a conditional limitation as the other, because a fee simple endures for ever, and any attempt to cut it down must be a defeasance.

The general law is that a defeasance, either by condition or by conditional limitation or executory devise, cannot be well limited to take effect in derogation, not merely of the right of alienation, but of any of the natural incidents of the estate which it is intended to divest. Instances of this are given in *Sir Anthony Mildmay's Case* (4), where the law is stated thus: "If a man makes gift in tail on condition that the donee shall not commit waste, or that his wife shall not be endowed, or that the husband of a woman tenant in tail after issue shall not be tenant by the courtesy, or that tenant in tail shall not suffer a common recovery, these conditions are repugnant and against law, because by the gift in tail, he tacitly enables him to commit waste, that his wife shall be endowed, and to suffer a common recovery. And therefore it is repugnant to restrain it by condition, for that would be to give a power, and to restrain the same power in one and the same deed."

As I have shewn, a conditional limitation or executory devise is subject to the same rule.

(1) 2 Ph. 701.
(2) 9 Hare, 475.
(3) 3 K. & J. 458.
(4) 6 Rep. 41 a.

The events upon which the executory devise in this case is to take effect seem to be, 1. alienation, and 2. bankruptcy, or judgment and execution. The alienation contemplated is any alienation whatever by the devisee, not limited in any way. This is clearly invalid. With respect to the other event, bankruptcy or judgment and execution effect an involuntary alienation. Can a fee simple estate be divested by an executory devise on that event? The liability of the estate to be attached by creditors on a bankruptcy or judgment is an incident of the estate, and no attempt to deprive it of that incident by direct prohibition would be valid. If a testator, after giving an estate in fee simple to *A.*, were to declare that such estate should not be subject to the bankruptcy laws, that would clearly be inoperative. I apprehend that this is the test. An incident of the estate given which cannot be directly taken away or prevented by the donor cannot be taken away indirectly by a condition which would cause the estate to revert to the donor, or by a conditional limitation or executory devise which would cause it to shift to another person. This agrees with the decision of Mr. Justice *Chitty* in *In re Machu* (1). The words "conditional limitation" seem to be used in that case not in the sense in which *Fearne* and *Butler* employ them, but rather to describe an estate upon which a contingent remainder might be limited. According to the illustrations which I have given from the definition by *Fearne*, the limitation in *In re Machu* would be, in a deed, a conditional limitation defeating a fee simple, and in a will an executory devise.

I am of opinion for the foregoing reasons that the executory devise in this case is invalid as repugnant.

It was attempted to distinguish one portion of it, namely, that which begins with the words "and if he shall die without leaving issue of his body him surviving," and it was argued that this gift over must be valid. But I am of opinion that this is only a portion of the limitations which are intended to take effect upon the forfeiture by alienation or bankruptcy, &c., and not otherwise.

The original devise is in trust for the Plaintiff, his heirs and assigns. The intention to defeat this must be as clearly expressed

(1) 21 Ch. D. 838.

as the gift, and if the last point were more doubtful than I think it is, the Plaintiff ought to have the benefit of the doubt.

It is consistent with the practice of the Court, as recognised in *Lady Langdale* v. *Briggs* (1), that the Plaintiff should have a declaration as to the nature of his interest and the validity of the gift over.

I must declare that he is entitled to an equitable estate in fee simple in the real property and to an absolute interest in the personalty given to him, and that the attempted executory gift over is void.

Solicitor: *F. J. Thairlwall,* agent for *Ainsworth, Sanderson & Howson, Blackburn.*

G. I. F. C.

In re HAMLET.
STEPHEN *v.* CUNNINGHAM.

[1888 H. 392.]

KAY, J.
1888
March 17, 19, 24.

Will– Construction—Portions—Vested Interest—Gift over on Death without "leaving" any Child or Children surviving—Testator whether in loco parentis to Grandchildren.

The artificial rules of construction adopted in *Emperor* v. *Rolfe* (2), and subsequent cases upon settlements, where the Court has overcome express words in defeasance of an interest which by previous words of gift was vested in a child, may apply to portions given by will as well as to gifts in settlements, but where the gift by will is not one of portions to children or persons to whom the testator was *in loco parentis* the words of the will must be construed according to their grammatical meaning.

The mere circumstance that a testator, in a clause providing for the maintenance of future children of his daughter and only child, who was then unmarried, speaks of shares previously given to such children as "portions," is not sufficient to shew that he has placed himself *in loco parentis* to such children.

A testator gave personal estate, and the proceeds of sale of real estate, to trustees upon trust for his daughter and only child for life, and after her death for her children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, with a gift over in case his daughter should "happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a

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(1) 8 D. M. & G. 391.
(2) 1 Ves. Sen. 208.

KAY, J.
1888
In re HAMLET.
STEPHEN *v.* CUNNINGHAM.

vested interest in the said trust moneys, and without leaving any issue them him or her surviving." The daughter had five children. They all died unmarried in her lifetime, and only two of them attained twenty-one. Upon the death of the daughter:—

Held, that the gift over took effect.

Quære, whether the construction would not have been the same if the instrument had been a settlement instead of a will.

ADJOURNED SUMMONS.

John Hamlet, by his will, dated the 23rd of May, 1825, gave his real and personal estate to trustees upon trust to sell, and, after payment of debts, to invest the residue of the proceeds, and pay the income to his daughter, *Elizabeth Ann*, during her life, and after her death, as to the capital, "in trust to pay, and I do hereby give and bequeath the same, unto all and every the children and child of her my said daughter *Elizabeth Ann*, who, being a son or sons, shall attain the age of twenty-one years, or, being a daughter or daughters, shall attain that age or marry, to be divided between or amongst them, if more than one, in equal shares and proportions (with benefit of survivorship between and amongst them in case any or either of them shall happen to die without having obtained a vested interest therein), and in case my said daughter, *Elizabeth Ann*, shall happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them him or her surviving, then" the testator gave the said trust moneys to *William Bennett* and *Sarah Goodwin* absolutely, and he declared that in the meantime, and until the vesting or payment of the "portions" thereby provided for the children of his said daughter, the trustees should, after her death, apply the income for their maintenance.

The testator had no child except his daughter, *Elizabeth Ann* mentioned in his will. He died in 1825. His daughter was then unmarried. In 1840 she married *J. W. Cunningham;* she had five children, of whom only two, viz., *Charles H. Cunningham* and *Elizabeth H. S. Cunningham*, attained twenty-one, and all died unmarried in the lifetime of their mother. On the 11th of January, 1881, *Elizabeth Ann Cunningham* died.

Charles H. Cunningham effected a mortgage of his share and interest under the will, and such mortgage became vested in *Henry S. Cunningham.*

This summons was taken out by the trustees of the will against *J. W. Cunningham* (who was the legal personal representative of *Charles H. Cunningham,* and also of *Elizabeth H. S. Cunningham*), *Henry S. Cunningham,* and the legal personal representatives of *William Bennett* and *Sarah Goodwin,* asking that it might be determined what were the trusts upon which, according to the true construction of the will, the proceeds of the testator's real and residuary personal estate ought to be held and applied from and after the death of *Elizabeth Ann Cunningham.*

Herbert Stephen, for the Plaintiffs, the trustees of the will.

Vaughan Hawkins, for *J. W. Cunningham,* and *Henry S. Cunningham*:—

The two children of *Elizabeth Ann Cunningham* who attained twenty-one took indefeasibly vested interests, and the gift over did not take effect. There is a clear primary gift to children who attain twenty-one. The gift over was intended to provide only for the event of there being infant children living at the death of the testator's daughter, and must be read as subject to the interests of the children who attained vested interests under the previous gift, that is, as if it were introduced by some such words as "subject as aforesaid": *In re Thompson's Trust* (1).

The word "leaving" in the gift over must be read "having" or "having had,"—*Maitland* v. *Chalie* (2); *Casamajor* v. *Strode* (3); *Kennedy* v. *Sedgwick* (4); *Bythesea* v. *Bythesea* (5);—so as to prevent the clear primary gift from being divested, according to the principle of *Emperor* v. *Rolfe* (6); *Powis* v. *Burdett* (7); *Swallow* v. *Binns* (8); *Walker* v. *Simpson* (9); *Jeyes* v. *Savage* (10).

[KAY, J.:—But here the words are "leaving her surviving," which makes that construction more difficult: *Young* v. *Turner* (11); *White* v. *Hill* (12).]

(1) 5 De G. & Sm. 667.
(2) 6 Madd. 243.
(3) 8 Jur. 14.
(4) 3 K. & J. 540.
(5) 23 L. J. (Ch.) 1004.
(6) 1 Ves. Sen. 208.
(7) 9 Ves. 428.
(8) 1 K. & J. 417.
(9) Ibid. 713.
(10) Law Rep. 10 Ch. 555.
(11) 1 B. & S. 550.
(12) Law Rep. 4 Eq. 265.

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In *Woodcock* v. *Duke of Dorset* (1) and *Currie* v. *Larkins* (2) the same difficulty was raised by the use of the word "survivor," but the Court got over it.

[KAY, J.:—Those were cases of settlements. The report of *Woodcock* v. *Duke of Dorset* was corrected in *Howgrave* v. *Cartier* (3).]

The principle applies equally to gifts in wills by way of portion: *Jackson* v. *Dover* (4); *Farrer* v. *Barker* (5). *Young* v. *Turner* (6) was not a case of portions, which the present case is. The testator refers to the shares of his grandchildren, as "portions;" by his will he in effect makes the marriage settlement of his daughter and only child, and he has thereby placed himself *in loco parentis* to her future children: *Ex parte Pye* (7); *Pym* v. *Lockyer* (8).

[KAY, J., referred to *Torres* v. *Franco* (9).]

Reference was also made to *Hallifax* v. *Wilson* (10), *Dalton* v. *Hill* (11), *Perfect* v. *Lord Curzon* (12), *Selby* v. *Whittaker* (13), *Day* v. *Radcliffe* (14), and *Wakefield* v. *Maffet* (15).

E. Beaumont, for the representatives of *Sarah Goodwin*:—

The gift over took effect on the death of *Elizabeth Ann Cunningham*. *Young* v. *Turner* is directly in point. The principle of *Emperor* v. *Rolfe* (16) and similar cases has been carried far enough, and ought not to be extended: *Jeyes* v. *Savage* (17). In all the cases there has been some ambiguity in the terms of the instrument of gift; here there is none.

[KAY, J.:—My difficulty is to distinguish this case from *Torres* v. *Franco* (18).]

That was the case of a settlement, and went upon the ground that there were conflicting clauses. The decision is not satisfactory, and the Court is not bound to follow it in construing an instrument of a different kind, where the words are not the same.

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(1) 3 Bro. C. C. 569.
(2) 4 D. J. & S. 245.
(3) 3 V. & B. 79.
(4) 2 H. & M. 209.
(5) 9 Hare, 737.
(6) 1 B. & S. 550.
(7) 18 Ves. 140.
(8) 5 My. & Cr. 29.
(9) 1 Russ. & My. 649.
(10) 16 Ves. 168.
(11) 10 W. R. 396.
(12) 5 Madd. 442.
(13) 6 Ch. D. 239.
(14) 3 Ch. D. 654.
(15) 10 App. Cas. 422.
(16) 1 Ves. Sen. 208.
(17) Law Rep. 10 Ch. 555.
(18) 1 Russ. & My. 649.

[He referred also to *In re Ball* (1).]

Bramwell Davis, for the representatives of *William Bennett*, adopted the same arguments, and referred to *Chadwick* v. *Greenall* (2), and in *In re Leader's Estate* (3).

Vaughan Hawkins, in reply:—

The further cases cited were not cases of portions.

1888. March 24. KAY, J. (after stating the provisions of the will and the facts of the case as above set forth, continued):—

The question is, whether the gift over upon the death of the testator's daughter *Elizabeth*, without leaving any child her surviving, has taken effect.

On the grammatical construction of the will I should come to the conclusion that, in the events that have happened, the gift over took effect. *Elizabeth* has died "without leaving any child or children her surviving." The other branch of the gift over, in my opinion, refers to the death without issue, under twenty-one, of children who might survive her.

It is argued that these are portions given to *Elizabeth's* children by their grandfather, who for this purpose had placed himself *in loco parentis*, and that the artificial rules of construction adopted in *Emperor* v. *Rolfe* (4), and a long series of subsequent cases upon settlements, where the Court has overcome express words which, taken literally, would divest an interest which by previous words of gift was vested in a child, apply to portions given by will, as well as to cases of settlements. I cannot deny that this doctrine may apply to gifts by will in certain cases. It was so decided in *Farrer* v. *Barker* (5), *Jackson* v. *Dover* (6), and *In re Knowles* (7).

But has any decision gone so far as to disregard such express

(1) 36 Ch. D. 508.
(2) 3 Giff. 221.
(3) 17 L. R. Ir. 279.
(4) 1 Ves. Sen. 208.
(5) 9 Hare, 737.
(6) 2 H. & M. 209.
(7) 21 Ch. D. 806.

KAY, J.
1888
In re HAMLET.
STEPHEN *v.* CUNNINGHAM.

words of gift as I find in this will? Most of the authorities are with reference to a limitation in a settlement in trust for the parent for life, then to children who attain twenty-one, and, if the parent die without leaving children, over. If children attain twenty-one, and all die in the parent's lifetime, the Court, to prevent the vested interests from being divested, has read the word "leaving" as though it were "having" or "having had," a considerable liberty being thus taken with the actual words to effectuate what the Court considers to be the paramount intention, in a marriage settlement, of securing portions to the children who live to attain vested interests in them.

But it cannot be denied that some of the cases on marriage settlements have gone beyond this. Generally speaking, they are all cases in which there was some ambiguity in the expressions used.

In *Torres* v. *Franco* (1), by a marriage settlement stock was to be held in trust for the husband and wife, and, if the wife survived, then after her death, if there should be any child or children living at the time of her decease, upon trust for such of the said children as should attain twenty-one or be married, as tenants in common, and if there should be but one such child who should live to attain that age or be married, then for the sole use of such child, the dividends of the apparent share of an infant to be applied, after the mother's death, for its maintenance, and in case the mother should die "without leaving any child or children at the time of her decease, or in case there shall be one or more such children or child then living, yet all of them shall die under the age of twenty-one years, and unmarried," then there was a limitation over. Sir *J. Leach* said (2): "The gift over is not to take effect, unless all the children die under age and unmarried. This is inconsistent with the clause which imports that a child, to take, must survive the mother, and where clauses are conflicting, the rational presumption is, that a child, attaining twenty-one, takes a vested interest."

The words of the gift over in that case resemble those in the case before me. I confess I should have thought that the gift over, in case there should be a child or children living at the mother's death, "yet all of them shall die," referred only to such children as might be then living; but it was not so construed. Such a decision seems to justify the words of Lord Justice *Turner*, in *Currie* v. *Larkins* (1), that where in the first part of the settlement it is clear that children are to take vested interests, a gift over, if they die in the lifetime of the parents, would not divest them.

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(1) 1 Russ. & My. 649.

(2) 1 Russ. & My. 654.

Lord *Cottenham*, in *Whatford* v. *Moore* (2), said that in these cases it may be thought that Courts have gone the full length that is justifiable, and that the cases on this subject are so little reconcileable that the only reasonable course is to lean in favour of a construction which includes all the children, if the instrument affords fair grounds for doing so; but, if not, to give effect to the plain meaning of the words used.

This was approved by Lord Justice *Turner*, in *Farrer* v. *Barker* (3), which was a case under a will, where he said that, although the same rule of construction upon this subject was applicable to wills and settlements, yet the different character of the instrument was a circumstance to be weighed; and, in the case before him, although the gifts were to grandchildren of the testator, there was nothing to shew that he stood *in loco parentis*, and accordingly the Court declined to apply the rule.

In *Young* v. *Turner* (4) there was a devise of real estate in trust for the testator's niece for life, and after her death to her issue, to be divided at twenty-one or marriage, and to their heirs and assigns, but if the niece should die leaving only one child, then to that only child in fee; but in case she should die without leaving any issue of her body at the time of her decease, or in case all such issue should die under twenty-one and unmarried, there was a gift over. The niece had only one child, a daughter, who attained twenty-one and died in her mother's lifetime, and it was held that the gift over took effect. This case was brought to the attention of Lord *Hatherley*, in *White* v. *Hill* (5), who said that it would be much more difficult to turn "leaving at the time of her decease" into "having" than "leaving" simply. The

(1) 4 D. J. & S. 245, 255.

(2) 3 My. & Cr. 270.

(3) 9 Hare, 737.

(4) 1 B. & S. 550.

(5) Law Rep. 4 Eq. 265.

words "at her decease" distinguish the case from *In re Thompson's Trust* (1).

The result of these decisions is that these words in a will, if the case is not a case of portions to children to whom the testator was *in loco parentis*, would receive a construction according to their grammatical meaning, which would exclude a child who attained twenty-one and died in the lifetime of the tenant for life. But in a settlement, or in a will where the testator was *in loco parentis* to the children intended to be benefited, the gift over might either be differently construed or disregarded.

The important question therefore is, was the testator in the case before me *in loco parentis* to the possible children of his daughter *Elizabeth*, who did not marry until after his death? The only ground for suggesting this is that in the maintenance clause he speaks of the shares of the possible grandchildren as portions. But if that is sufficient to place the testator *in loco parentis* to grandchildren, not one of whom was born in his lifetime, I do not see how it could be denied that any gift by a testator to his grandchildren, or any settlement under which grandchildren of the settlor would take a benefit, would put him *in loco parentis* to such grandchildren, whether he ever saw them or not.

In *Ex parte Pye* (2) Lord *Eldon* defines "*locus parentis*" as being "the situation of the person described as the lawful father of that child." This definition, which is little more than a literal translation, is adopted by Lord *Cottenham* in *Powys* v. *Mansfield* (3); and in *Pym* v. *Lockyer* (4) the same learned Judge said that, for the purpose of the rule against double portions, whether the donor had assumed the office of a parent may be proved by extrinsic evidence, such as the general conduct of the donor towards the children, or by intrinsic evidence from the nature and terms of the gift.

In *Tucker* v. *Burrow* (5), with regard to the presumption of advancement, Lord *Hatherley* said that it had been applied to the case of an illegitimate child, a grandchild after its father's death,

(1) 5 De G. & Sm. 667.
(2) 18 Ves. 140.
(3) 3 My. & Cr. 359, 367.
(4) 5 My. & Cr. 29, 35.
(5) 2 H. & M. 515.

and a person towards whom the purchaser had assumed the position of a parent; but he repeats a question of Lord Justice *Knight Bruce*, "Is there any case of grandfather, father and son, the father alive?"

No case was cited, nor do I know of any, which has carried the doctrine of a testator placing himself *in loco parentis* to grandchildren, objects of his bounty, by the mere words of the will, anything like so far as I am asked to carry it in this case.

I decline to do this for the purpose of introducing a rule of construction which does violence to the actual words of the will. In one of the last cases on this subject, *Jeyes* v. *Savage* (1), which was the case of a settlement, the Court intimated that these authorities had been carried far enough, and declined to apply the rule under the terms of that deed. I confess that is my own opinion. If this had been the case of a settlement, in construing which the paramount consideration of making a provision for children of the marriage who attained twenty-one might be allowed to control words of defeasance, the true principle is that, before the Court can do so, it must be satisfied that there is an ambiguity in the terms of the instrument. I, on the contrary, am satisfied that in this case there is no such ambiguity, and I should hesitate long before I applied the rule to the words I have to deal with, if they were in a settlement. This is not the case of a settlement, but of a will, to which no such stringent rule is applicable.

I must therefore construe these words according to their obvious meaning; and I accordingly hold that, in the events that have happened, the gift over to *Wm. Bennett* and *Sarah Goodwin* took effect.

Solicitors: *Prideaux & Sons; T. D. Francis; Munns & Longden.*

C. C. M. D.

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(1) Law Rep. 10 Ch. 555.

CHITTY, J.
1888
Feb. 4, 6.

DE RECHBERG *v.* BEETON.

[1886 D. 2336.]

Succession Duty.

By the will of *X.* ecclesiastical leaseholds for lives of which *Y.*'s was the last, were settled upon trusts for *Y.* for life and over. *A.* having acquired the life interest of *Y.*, bought the reversion in the leaseholds from the Ecclesiastical Commissioners, and had been held to have purchased as trustee for the persons entitled under the will of *X.* Part of the land was represented by a sum paid into Court as compensation by a public body which had taken it under statutory powers. After the death of *Y.* the equitable interest under the will of *X.* had become vested absolutely in *B.*, who, after satisfying *A.*'s lien for purchase-money, was entitled (*inter alia*) to the fund in Court:—

Held, that *B.*'s title was, for purposes of duty, a title acquired under the will and not by purchase, and that succession duty was payable as on the death of *Y.* as predecessor.

Fryer v. *Morland* (1) distinguished.

PETITION for transfer to the Countess *de Rechberg* of a sum of £1652 1*s.* 3*d.* Consols, standing in Court and representing the purchase-money and compensation for lands at *Fulham*, taken by the *London School Board* in 1878; and for carrying into effect the compromise of an action brought by the Countess against the Petitioners, *R. J. S. Beeton* and *Elizabeth Crowle.*

The only question raised was whether succession duty was payable in respect of this sum of £1652 1*s.* 3*d.*, as on the death of *Thomas Heron* Viscount *Ranelagh* VII., under the following circumstances:—

The lands taken by the *London School Board* formed part of certain leaseholds at *Fulham* (part of the Bishop of *London*'s estate), held of the Ecclesiastical Commissioners under a renewed lease of May, 1825, granted by the Bishop of *London* for three lives, of which the last expired in November, 1885.

At the date of his will (August, 1814) and at the time of his death, July, 1820, *Thomas* Viscount *Ranelagh* VI., the testator, was entitled to these leaseholds, and by his will he devised them to trustees on trust for his son, *Thomas Heron* Viscount *Ranelagh* VII., for life, with remainders in favour of testator's daughters and their issue, and an ultimate remainder in favour of testator's right heirs in fee. [See *In re Lord Ranelagh's Will* (1), where the particulars of the will and the title to the leaseholds are fully set out.]

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(1) 3 Ch. D. 675.

The testator, who died in July, 1820, left one son, *Thomas Heron* Viscount *Ranelagh* VII., and three daughters, of whom the Countess *de Rechberg* was the survivor.

In October, 1876, Viscount *Ranelagh* VII. contracted to sell and by deed of the 24th of March, 1879, conveyed his life interest and all other his estate and interest in the *Fulham* leaseholds to the Petitioners *Beeton* and *Crowle.*

On the 7th of August, 1879, the Ecclesiastical Commissioners (in whom, subject to any legally subsisting lease thereof, the property had become vested for the purposes of their Acts), in consideration of £2300 conveyed the reversion in fee of the *Fulham* leaseholds to *Beeton* and *Crowle* as tenants in common, but subject to such trusts, equities, and interests as then affected the leasehold interest under the will of May, 1825.

In 1884 *Beeton* and *Crowle* presented a petition for a transfer and payment of the £1650 in Court and accrued interest representing the purchase-money, and compensation for the portions of the *Fulham* leaseholds which had been taken by the *London School Board.*

The petition was heard before the late Mr. Justice *Pearson* on the 29th and 31st of March, 1884, and his Lordship held that according to the ordinary doctrine of equity it was impossible for *Beeton* and *Crowle* to purchase the reversion otherwise than as trustees for the persons interested in the will under the trusts of the will, and that, subject to their right to be recouped the purchase-money, they were only entitled to an order for payment of so much of the fund in Court as represented income or accumulations of income, and, during the life of the tenant for life (Viscount *Ranelagh* VII.) or until further order, to the interest upon the residue of the fund. (See *In re Lord Ranelagh's Will.*)

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(1) 26 Ch. D. 590.

Thomas Heron Viscount *Ranelagh* VII., the last surviving life named in the will of 1825, died on the 13th of November, 1885. The Countess *de Rechberg* was the surviving daughter of Viscount *Ranelagh* VI., and by an order of the 25th of June, 1887, made by Mr. Justice *Chitty*, on petition, in an old administration suit of *Ranelagh* v. *Ranelagh*, it was declared "that upon the true construction of the will of Viscount *Ranelagh* VI. and in the events that had happened the Countess *de Rechberg* became on the death of Viscount *Ranelagh* VII. solely entitled, as equitable *quasi* tenant in tail, to the hereditaments at *Fulham*, held on leases for life, and devised by and remaining subject to the trusts of the said will, and, subject to a certain agreement (as to the proceeds of sale of certain hereditaments sold to the *Metropolitan District Company*), to the moneys representing the sale of such of them as had been sold." She had since executed a disentailing deed.

In December, 1886, the Countess *de Rechberg* had commenced an action against *Beeton* and Mrs. *Crowle* claiming a declaration that they were trustees for her of the land taken by the *London School Board*, subject to a lien thereon in their favour for the purchase-money of £2300 with interest from the 13th of November, 1885, and that subject to such lien the Plaintiff was absolutely entitled to the sum of £1632 1*s.* 3*d.* in Court; and that the Defendants, on payment by Plaintiff (the Countess) to them of the £2300, with interest, might be ordered to convey the land to the Plaintiff, and concur in all necessary acts for procuring the transfer and payment to the Plaintiff of the £1632 1*s.* 3*d.* in Court.

A compromise of this action had been agreed to upon the terms (1) that the £1632 1*s.* 3*d.* in Court should be transferred to the Countess; (2) that upon payment by *Beeton* to the Countess of £200 (for costs) the Countess should execute to *Beeton* a conveyance and release of her equitable interest.

The present petition was presented for the purpose of carrying this compromise into effect, and for payment of the costs of the petition under sect. 80 of the *Lands Clauses Consolidation Act* by the *London School Board*, except so far as they had been increased by this litigation between the Countess and the Petitioners, and for payment to the Countess of the fund in Court.

The question arose whether succession duty was payable as on the death of Lord *Ranelagh* VII. in respect of the fund in Court.

John Cutler, in support of the petition.

P. V. Smith, for the *London School Board.*

A. E. Dryden, for other parties.

J. G. Wood for the Countess *de Rechberg* :—

Succession duty is not payable in respect of the fund in Court, which represents the value of the reversion, which was purchased for value by *Beeton* and Mrs. *Crowle*, the assignees of the seventh Viscount's life estate, from the Ecclesiastical Commissioners, and never in any way formed part of, nor was it derived from, the estate of the sixth Viscount.

The case therefore falls within the rule laid down in *Fryer* v. *Morland* (1), that the Act does not apply to the acquisition of a succession by *bonâ fide* purchase for valuable consideration, but only where it is acquired by gratuitous title.

Our equity is an equity to be substituted for the Petitioners, as purchasers of the reversion, on the terms of recouping them what they have paid to the Ecclesiastical Commissioners.

[CHITTY, J.:—Only by virtue of the will of the sixth Viscount.]

Although our equity may arise under that will, it does not make the sixth Viscount a predecessor. All that it does is to give us a right to be substituted for the actual purchasers. And if those purchasers could not have been called upon to pay succession, how can any liability to the Crown arise out of the circumstance that the Countess has the right to require them to give her the benefit of their purchase on the terms of repaying them the amount for which they have a lien?

[CHITTY, J.:—*Beeton* and *Crowle* were in the position of trustees in relation to that purchase.]

They were merely constructive and not absolute trustees. And in any case the fact that the reversion has been acquired for valuable consideration and not gratuitously, relieves the Countess, who stands in the place of the original purchasers, from any claim to duty under the Act.

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(1) 3 Ch. D. 675.

Vaughan Hawkins, for the Crown, was stopped.

CHITTY, J.:—

Mr. *Beeton* and Mrs. *Crowle* bought the reversion of property which was held under leases for lives, which leases for lives were subject to the trusts of the sixth Viscount's will. If Mr. *Beeton* and Mrs. *Crowle* had bought on their own account, and had been entitled to hold on their own behalf, there is no question that succession duty would not have attached. But it cannot be contested, and in fact it is admitted, that if there had been a trust in the will of the sixth Viscount out of his estate to purchase this reversion, then the person who came in on the death of the seventh Viscount succeeded to the estate by virtue of the trusts of the sixth Viscount's will, and would have had to pay duty upon that succession. That being so it appears to me that the circumstances of this case bring it exactly within the second and not within the first class of cases I have described. Mr. *Beeton* and Mrs. *Crowle* could not hold for their own benefit. Why? Because they were affected by the trusts of the sixth Viscount's will. It is said that they paid the money themselves, and so they did, because they attempted to set up an independent title for themselves, but it was decided by Mr. Justice *Pearson* that they could not hold the reversion for their own benefit. The reversion was acquired for the benefit of those interested under the sixth Viscount's will; but Mr. *Beeton* and Mrs. *Crowle*, having paid the purchase-money, were entitled to be repaid, and unquestionably they had a lien for the amount upon the reversion, which was held by Mr. Justice *Pearson*, upon the facts, to be part of the testator's estate. The result, therefore, is, that although there has been some compromise, the details of which are immaterial, Mr. *Beeton* and Mrs. *Crowle* were entitled to be paid, and have been paid, through the medium of that compromise, the £2300 which they advanced as purchase-money. It comes exactly to the same thing as if there had been a trust in the sixth Viscount's will for the purchase of the reversion; and so the duty attaches.

Solicitors: *Ward,] Asplin, & Taunton; Helder & Roberts; Gedge, Kirby, & Millett; Solicitor to Treasury.*

F. G. A. W.

WILLS *v.* LUFF.

[1881 W. 2953.]

CHITTY, J.

1888

March 16.

Receiver—Mortgagor and Mortgagee—Foreclosure Absolute.

After judgment for foreclosure absolute, the action being at an end, the Plaintiff cannot obtain an order for the appointment of a receiver of the mortgaged property, even though the conveyance of the property to the Plaintiff remains to be settled.

MOTION.

This case raised the question whether the Plaintiff in a foreclosure action, after judgment for foreclosure absolute, can obtain an order for the appointment of a receiver.

The action was brought in July, 1881, against the Defendants *G. T. B. Luff* and *B. H. Van Tromp* to enforce by foreclosure or sale an equitable charge, in favour of the Plaintiff, under a memorandum dated the 31st of March, 1880, and signed by the Defendant, *G. T. B. Luff*, on six leasehold houses at *Fulham*, held under a lease of 1878 for a term of 97¾ years at a ground rent of £30 per annum.

The Defendant *Van Tromp* was made a Defendant to the action as assignee from *Luff* by conveyance of the 23rd of September, 1880, of the leasehold houses for the residue of the term.

On the 15th of February, 1881, *Van Tromp* mortgaged the property to an insurance company for a sum exceeding its value without disclosing the existence of Plaintiff's charge. It appeared, however, that in the circumstances, which were somewhat complicated, the priority of this charge over that of the Plaintiff was not disputed.

The action came on for trial on the 4th of June, 1883, and, on both the Defendants submitting to such judgment as Plaintiff was entitled to on his claim, a personal order was made against *Luff* for payment of the balance due under the charge and costs of the action, with a direction that the leasehold houses were charged with payment of the amount, and the usual foreclosure judgment *nisi* against the Defendant *Van Tromp*.

By order of the 8th of May, 1884, a day was fixed for payment of the amount due under the judgment, and it was ordered that in the event of *Van Tromp* being foreclosed he should execute to Plaintiff, if and when he required the same, a proper assignment of the mortgaged property, subject only to such incumbrances as might be entitled to priority over his charge, such assignment to be settled by the Judge in case the parties differed.

On the 8th of August, 1884, a final order for foreclosure absolute was made against *Van Tromp.*

In January last the Plaintiff had taken out a summons for the appointment of a receiver over the property comprised in the order for foreclosure absolute (but without prejudice to the right of any prior incumbrancer), and that the tenants might be ordered to attorn and pay their rents to such receiver, and that the receiver might be directed out of the rents and profits to pay the ground rent and to perform and observe the covenants contained in the superior lease, and to discharge the insurances and other proper outgoings, and to pay the balance to the Plaintiff.

In the affidavit in support of the application, it was stated that *Van Tromp* had since, and notwithstanding the foreclosure absolute, been in receipt of the rents and profits, and was applying the balance, after paying certain outgoings, for his own purposes; and also that the insurance company (the priority of whose mortgage over that of the Plaintiff was not now disputed) was not, and had not for some time past, been in possession of the mortgaged property.

The Plaintiff had not since the order for foreclosure absolute applied to *Van Tromp* for execution of an assignment of the mortgaged premises.

The summons had been adjourned into Court to come on by way of motion.

Sir *A. Watson*, Q.C., and *Rowden*, in support of the motion:—

The object of this application is to obtain the benefit of our foreclosure judgment without incurring the responsibility which, if we were to take possession under an assignment from the Defendant *Van Tromp*, as mentioned in the order of May, 1884, might attach under the covenants entered into by *Van Tromp* with his mortgagees, including the covenants to pay principal and interest, and to perform the covenants of the original lease. Although it will be said that final judgment has been given, the cause, so long as anything remains to be done under the judgment, is still "pending" within the *Judicature Act*, 1873, sect. 24, sub-sect. 7, so as to give the Court jurisdiction to make the order: *Salt* v. *Cooper* (1).

[Chitty, J.:—The difficulty is that the receiver will be appointed in the action when it is at an end. Neither I nor my Chief Clerk ever heard of such an order, and I am told by the Registrar that he has never drawn up such an order. The receiver will account to you, but how can he be discharged now that the action is at an end. Why do you not take out a summons for a conveyance?]

Until the proper form of conveyance is settled it cannot be said that the action is at an end, as the Defendant has still some estate, interest or title remaining in him, and he can distrain upon the tenants. We submit that, by analogy to the practice of appointing a receiver by way of equitable execution in the case of a judgment creditor, the Court has jurisdiction to make the order so as to realise for the Plaintiff the fruits of his foreclosure judgment which are not otherwise available.

Romer, Q.C., and *A. àB. Terrell*, for the Defendant *Van Tromp*, submitted that the *Judicature Acts* had in no way enlarged the equitable jurisdiction of the Court. The Defendant has been receiving the rents not for his own benefit, but as agent of his mortgagees, the insurance company.

Sir *A. Watson*, in reply.

Chitty, J.:—

The Plaintiff has obtained a foreclosure decree, which was afterwards made absolute. That being so, all that remains to be said is that the action is at an end, with the exception of the settlement of a conveyance by the Judge, if the parties differ.

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(1) 16 Ch. D. 544.

It is the Plaintiff who has the right, if he requires a conveyance, to take proceedings in order to obtain it. For reasons which are obvious in the present case, the Plaintiff does not proceed with that part of the existing order. Subject to that one matter the suit has been worked out. The Court has no power to add to a foreclosure decree. The decree is in itself, when made absolute, final, subject to this, that even after the absolute decree has been made the Court, in a proper case, within a short and reasonable time, may allow further time, on the conditions which it always imposes, for the purpose of letting in the Defendant to redeem. Subject to that observation, the action is at an end. The Plaintiff here asks for a receiver, and justifies his application on the analogy of equitable execution, but to place this case on that analogy is erroneous. Equitable execution is a process which the Court allows for the purpose of enabling a judgment creditor to obtain payment of his debt, when the position of the real estate is such that ordinary execution will not reach it. The process, which was formerly the process of the Court of Chancery, by appointment of a receiver, is one that will reach many things which cannot be taken in execution, and the appointment of a receiver, therefore, is a form of equitable execution. But receiver of what? Not receiver of the subject-matter of the action, but receiver of some portion of the Defendant's property which is charged already with payment of the judgment debt, but which there is difficulty in reaching. He is a receiver, not of lands or of rents, but of the Defendant's interest, and nothing else, and it is confined to that. That is a simple mode of equitable execution. Here, however, there is no judgment upon which execution can go.

There is no judgment against the Defendant *Van Tromp* that he should pay this money. The circumstances of the case are such that the judgment against him was a judgment for foreclosure absolute. There is nothing in the judgment of the late Master of the Rolls in *Salt* v. *Cooper* (1), nor is there anything in the *Judicature Acts* which would warrant me in saying that the judgment has not been worked out. In my opinion it has been worked out subject to the point which I have already mentioned. I do not say whether the Plaintiff could not obtain an order for possession. I propose to leave that question entirely open, without, however, encouraging the Plaintiff to ask for it, because he has taken that kind of judgment which I am afraid he apprehends will not work at all for his benefit. He is under the impression that covenants would have to be inserted in the assignment which would be very burdensome, and that he would have to pay very large charges in favour of persons not parties to the action, so that, in fact, he would get nothing whatever out of the judgment. I am not at liberty to enlarge the scope of the judgment. I must let that remain as it stands. There are, to my mind, some difficulties with regard to making an order for possession, but I leave that question open and altogether unprejudiced. I can find no analogy or ground whatever for acceding to the application which is now made. As between the Plaintiff and Defendant, the Defendant has no right to the rents whatever, and as between them there is this peculiarity, that if the order for a receiver were made, the receiver would be the Plaintiff's receiver, for he would not have to account for anything to the Defendant. I should be making an order for a receivership, as it were, in the air. The Plaintiff is, in fact, asking for a receivership order against himself, in respect of the interest which is all vested in him. I decline to say anything as to the merits of the case, for the question before me is a purely technical one. Whether Mr. *Van Tromp's* conduct has been proper or improper, if he is right, as I consider him to be, on this motion, I ought not to refuse to give him his costs. I refuse the motion with costs.

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(1) 16 Ch. D. 544.

Solicitors: *E. Bromley; B. H. Van Tromp.*

F. G. A. W.

NORTH, J.
1887
Dec. 15.

COOKE v. COOKE.

[1887 C. 1853.]

Will—Construction—Appointment—Remoteness—Severable Proviso—Infant—Settlement—Ratification.

Marriage settlements gave the intended husband and wife power by deed, or the survivor by deed or will, to appoint among children. The husband survived, and by will appointed the settled property among his three daughters equally, with a proviso that if at the time of his death any of them should be unmarried, her share should be held on trust for her for life, and after her decease, in case she should die leaving issue, as she should appoint, and in default of appointment, or in case she should not leave issue, on corresponding trusts in favour of his other children:—

Held, that the trusts of the proviso were inseparable and totally void for remoteness, and that the absolute gift in favour of a daughter unmarried at the death of the testator prevailed.

By an ante-nuptial settlement, dated 1834, to which the wife (an infant) was party, her parents agreed, and the husband covenanted, that the husband and wife would, on her attaining twenty-one, convey her real estate to the uses of the settlement. In 1836 the wife, having attained twenty-one, by deed duly acknowledged, in which the husband concurred, granted the real estate to the uses of the settlement:—

Held, for the purpose of testing the validity of the exercise of a power, with reference to the rule against perpetuity, that the real estate was settled in 1834.

THREE indentures of settlement, each dated the 31st of March, 1834, were executed in contemplation of and immediately before the marriage of *Isaac Allan Cooke* and Miss *Mary Ann Cole Wathen* (then under age). The first settlement comprised a reversionary third share of two sums of £700 and £4000 consols, to which the intended wife was entitled, and two sums of £2000 each and an annuity of £50, covenanted to be paid to the trustees by her father. The second settlement comprised a reversionary half share of freehold property to which the intended wife was entitled on the death of her father and mother, a third share of reversionary leasehold property to which she was entitled in a similar way, and another reversionary third share in the leaseholds to which her father was entitled. The third settlement related to personal property brought into settlement by the intended husband.

Under each of the settlements the intended husband and wife were given successive life interests, with power for the husband and wife by deed, or the survivor by deed or will, to appoint the *corpus* among the children of the intended marriage.

The power of appointment contained in the first settlement was in the form of a declaration that the trustees of the settlement should hold the trust premises "from and after the several deceases of the said *Isaac Allan Cooke* and *Mary Ann Cole Wathen*, in trust to pay the said hereby assigned parts or shares of and in the said sums of £700 and £4000 respectively, and the entirety of the said several sums of £2000 and £2000, and all dividends, interest and annual proceeds of the same respectively, and the said annual sum of £50, unto the child or to all or such of the children of the said intended marriage, and in such parts, shares and proportions if the appointment shall be in favour of more than one, and at such ages or times, and with such provisions for maintenance, with such restrictions, and generally in such manner and form as they, the said *Isaac Allan Cooke* and *Mary Ann Cole Wathen*, his intended wife, or the survivor of them, shall by any deed or deeds, instrument or instruments in writing, duly executed in the presence of and attested by one, two or more credible witness or witnesses, or the survivor of them, by his or her last will and testament, duly executed in the presence of and attested by two or more credible witness or witnesses, limit, direct or appoint the same." The powers of appointment in the other deeds were similar in effect but not identical in language: there were separate powers in the second settlement relating respectively to the freehold and leasehold property.

The second settlement was made between *George Wathen* and *Sarah* his wife, the father and mother of the intended wife, of the first part, *Isaac Allan Cooke* of the second part, *Mary Ann Cole Wathen* of the third part, and the trustees of the fourth part. It witnessed in respect of the real estate comprised in it that, "in consideration of the said intended marriage, and of the said several indentures of even date therewith thereinbefore mentioned, *Wathen* and wife did thereby respectively agree and declare, and the said *Isaac Allan Cooke* thereby covenanted, promised and agreed with the parties thereto of the fourth part, that in case the said marriage should take effect they, the said *Isaac Allan Cooke* and *Mary Ann Cole Wathen*, would, immediately after she should have attained the age of twenty-one years, convey and assure to the parties thereto of the fourth part, subject to the life estates of the said *George Wathen* and *Sarah* his wife, the moiety or other the part or share of the said *Mary Ann Cole Wathen* of and in the said freehold hereditaments, to the uses, upon the trusts, and under and subject to the several powers and agreements thereinafter limited and declared concerning the same, or as near thereto as circumstances would admit.

At the time the settlements were executed *Mary Ann Cole Wathen*, the intended wife, was under age; she was expressed to be a party to and executed each of the settlements. The eldest child of the marriage, *Margaret Cooke*, the Plaintiff to the summons, was born on the 16th of March, 1835.

By an indenture dated the 5th of October, 1836, indorsed on the first settlement made between *Isaac Allen Cooke* and *Mary Ann Cole* his wife (who had in the meanwhile attained twenty-one) of the one part and the trustees of the settlement of the other part the parties of the first part assigned to the trustees the reversionary interest of the wife in the sums of £700 and £4000, to be held on the trusts of the within-written settlement.

By another indenture, also dated the 5th of October, 1836, indorsed on the second settlement, made between *Isaac Allen Cooke* and his wife of the one part and the trustees of the other, duly acknowledged by Mr. *Cooke*, the parties of the first part granted to the use of the trustees the moiety of the real estate comprised in the second settlement to which Mrs. *Cooke* was entitled in reversion, and assigned the third share of the leaseholds comprised in the settlement to which Mrs. *Cooke* was entitled to be held on the trusts of the settlement.

There were issue of the marriage three children only who attained twenty-one or married, namely, *Margaret Cooke*, the Plaintiff to this summons, who had not married; *Agnes*, the wife of *Arthur Richard Lewis Whish*, and *Georgina Mildred*, the wife of *Maitland Moore Lane*.

Mrs. *Cooke* died in January, 1863, without having joined her husband in executing any appointment under the powers contained in the settlements.

Isaac Allen Cooke made his will, dated the 21st of September, 1872. After reference to the power of appointment he had under the several settlements, the will contained the following passage:

"Now, in exercise of the power so reserved to me by the said three several indentures respectively, and of any other power or powers respectively enabling me in this behalf, I hereby direct and appoint that all and singular the said freehold and leasehold hereditaments and premises, and the moneys and securities representing the same if sold, and all other the said moneys, stocks, funds, and securities comprised in the said three several indentures, or either of them, shall go to and be vested in my three surviving children of the said marriage, namely *Margaret Cooke*, *Agnes*, the wife of *Arthur Richard Lewis Whish*, and *Georgina Mildred*, the wife of *Maitland Moore Lane*, in equal shares and proportions, subject nevertheless, as to the share of either of my said children who may be unmarried at the time of my decease, to the proviso and declaration next hereinafter contained, that is to say: Provided, and I hereby expressly declare, that in case either of my said three surviving children shall be unmarried at the time of my decease, the share of such unmarried child shall be held by the trustees or trustee of this my will upon trust to pay the income and annual proceeds thereof from the day of my decease unto such unmarried child during her life for her separate use, independently of any husband with whom she may intermarry, without power of anticipation, for which income and annual proceeds her receipt in writing shall be sufficient discharge; and from and after the decease of such unmarried child, as to as well her share and the income and annual proceeds thereof, in case the said unmarried child shall die leaving issue, upon trust for such person or persons, and for such purposes, as such unmarried child, whether covert or sole, shall by will appoint. And in default of appointment upon such trusts and with such power equally in favour of my other children or child as shall correspond with the preceding trusts and power in favour of such unmarried child; but if such unmarried child shall die without leaving issue, then upon the same trusts and with the same power as are hereinbefore declared in the event of the said unmarried child dying leaving issue and without having exercised the power of appointment in that case given."

Isaac Allen Cooke died in 1874.

This was an originating summons for, among other things, a declaration that *Margaret Cooke*, the Plaintiff to the summons, was entitled, as appointee under her father's will, to one-third of the settled property absolutely.

The Defendants were the surviving trustee of the settlement, Mr. and Mrs. *Whish*, and Mr. and Mrs. *Lane*.

Cozens-Hardy, Q.C., and *Kenyon Parker*, for the Plaintiff:—

It is clear that the limitation contingently cutting down the Plaintiff's absolute interest, so far as it attempts to give her a power of appointment, is void. We submit that the contingent life interests given to the other two daughters are so mixed up with a disposition that is void for remoteness that they fail also. And that the absolute interest given in the first place to the Plaintiff prevails: *Morgan* v. *Gronow* (1); *Berrie* v. *Howitt* (2).

It has been suggested that, so far as the real estate of Mrs. *Cooke* is concerned, the settlement of that property dates from 1836, the time at which it was confirmed by her, in which case, inasmuch as the Plaintiff was then *in esse*, there would be no objection to the contingent limitation on the absolute gift previously given. That suggestion, however, has no weight, for the settlement was not void but only voidable: *Smith* v. *Lucas* (3); *Burnaby* v. *Equitable Reversionary Interest Society* (4); *Campbell* v. *Bainbridge* (5).

George Foster Cooke, for the trustee.

Cookson, Q.C., and *Townsend*, for the other Defendants:—

As to the exercise of the power, the limitation over is good so far as it does not offend the rule against perpetuity. The

(1) Law Rep. 16 Eq. 1.
(2) W. N. (1867) p. 128.
(3) 18 Ch. D. 531.
(4) 28 Ch. D. 416.
(5) Law Rep. 6 Eq. 269.

contingent life interests given to the other daughters of the testator in case Miss *Cooke* leaves no issue, are separable from the bad part of the appointment, and will in that event take effect: *Carver* v. *Bowles* (1); *Churchill* v. *Churchill* (2); *Jarman* on Wills (3); *Whittell* v. *Dudin* (4); *Williamson* v. *Farwell* (5); *Carr* v. *Atkinson* (6); *Crozier* v. *Crozier* (7); *Webb* v. *Sadler* (8).

As to the wife's real estate, in the first place we say that the settlement of that cannot date earlier than the date at which it was confirmed by the wife. Previously to that the only things that purported to affect it were the agreement by the father and mother, and the covenant by the husband, none of whom had any interest in the property. The so-called confirmation was not a confirmation but a conveyance *de novo*.

The wife at the time of the supposed confirmation was under coverture, and could not confirm the settlement. Independently of the rule against perpetuities, the settlement is within the power: *Slark* v. *Dakyns* (9).

NORTH, J.:—

There are two points for decision in this case. The first is, as to the construction of the will of *Isaac Allan Cooke*, the surviving husband, who together with his then intended wife entered into three several ante-nuptial settlements in 1834. He, being the survivor of the two, by his will recites the powers he had under those settlements, and then proceeds:—[His Lordship read the terms of the appointment to his three daughters absolutely, and proceeded:—] Now, stopping there, there would be no question here that each daughter took an absolute equal share. But it is said that there is something which follows that cuts down the effect of that gift in respect (in the event which has happened) of the Plaintiff's share. What follows is this: "subject nevertheless as to the share of either of my said children who may be unmarried at the time of my decease to the proviso and declaration next hereinafter contained."

(1) 2 Russ. & My. 301, 304, 306.
(2) Law Rep. 5 Eq. 44.
(3) 4th Ed. vol. i. p. 872.
(4) 2 Jac. & W. 279.
(5) 35 Ch. D. 128.
(6) Law Rep. 14 Eq. 397.
(7) 3 D. & War. 353.
(8) Law Rep. 8 Ch. 419.
(9) Law Rep. 10 Ch. 35.

That is the only restriction whatever imposed upon the previous absolute gift. I take it he was there referring to the possibility, not only of the unmarried daughter remaining unmarried, but also of one or more of his daughters being widows, and that he has in his mind the possibility that something might happen which would render it desirable that the subsequent direction should apply to any one or more of the shares, and there is this contingent provision possibly applicable to all or any of the shares. Unless the contingency happens the shares remain absolute, and when he does deal with it he says:—[His Lordship read the proviso in the testator's will set out above relating to the appointed share of any child unmarried at the date of his decease.] And then he proceeds in a particular event to impose some restriction on the enjoyment of the shares. I need not read the next words. It is not disputed that the effect of them would be to tie up the shares longer than the rules against perpetuity allow. That being so, what becomes of the property in the case of the Plaintiff's share: is it undisposed of, or do the trusts given of the other children's life interest take effect, or does the gift to the three in equal shares and proportions prevail, so that she gets her share absolutely? In my opinion that is the construction that is to have effect. A few cases have been referred to out of a very large number on this subject. The rule, as I understand it, is that where there is an absolute gift followed by an attempt to limit the effect of that gift, which limitation for some reason cannot take effect, the original gift will take effect; but if on the true construction there is no original gift independently of the void limitation, you cannot sever the gift into two parts and the whole gift fails. I do not think it worth while to refer to the cases. *Whittell* v. *Dudin* (1) is one of those cases which has been recognised as an authority by the subsequent cases, including *Lassence* v. *Tierney* (2), in which the Lord Chancellor (3) refers to *Whittell* v. *Dudin* as a case in which a rule had been expounded, and says "*Carver* v. *Bowles* (4) and *Kampf* v. *Jones* (5), which was founded upon it, were cases of the execution of powers, in which there were absolute appointments within the powers, and attempts to modify the enjoyment beyond the powers; and it was held that the absolute appointments were to prevail."

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(1) 2 Jac. & W. 279.
(2) 1 Mac. & G. 551.
(3) 1 Mac. & G. 563.
(4) 2 Russ. & My. 301.
(5) 2 Keen, 756.

In the present case I have no doubt that the testator did not intend the Plaintiff to take absolutely, as he grafted on the gift to her subsequent limitations: but as those limitations are illegal they cannot be allowed to prevail, and the absolute gift to her must take effect, unaffected by them.

That disposes of the case in respect of all the property, except the funds representing Mrs. *Cooke's* interest in the freehold. As to that the matter stands in this way. The settlement was made in 1834, and the Plaintiff was born in 1835. Mrs. *Cooke* having attained twenty-one, ratified the settlement in 1836. The settlement itself was not, as is often the case, a covenant to settle after-acquired property, but it was an agreement by the father and mother of the intended wife, in consideration of the intended marriage and the several settlements, and a covenant by the intended husband that in case the marriage should take effect the husband and wife would, immediately after she should attain twenty-one, convey her freehold reversionary property to the trustees of the settlement. Therefore they were dealing with property which at that time did belong to the lady, who was an infant, but was under no incapacity except infancy. It is said that that settlement of freeholds was absolutely void. I know of no ground for saying so; to hold that it was would be to go directly against *Smith* v. *Lucas* (1). That instrument was therefore voidable, but it never was avoided, it remained binding in 1836; she then executed a deed in which her husband concurred and which was duly acknowledged according to law. Beyond all question it was intended to be a confirmation of the settlement whatever the legal effect of it was. That may depend in some respects on its terms: but, looking at its language, no one can read it without seeing that the very thing they did intend to do was to confirm the settlement. In my opinion the estate was bound already by the agreement, which was voidable and not void, and Mrs. *Cooke* did, by confirming it, do everything that was required to make the settlement binding. In my opinion she could make a convey-

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(1) 18 Ch. D. 531.

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ance in favour of the trustees just as much as to anybody else, and I hold that, for the purpose of the rule against perpetuities, the power over the real estate was conferred at the date of the marriage settlement.

But then it is said that at the time the confirmation was made the wife was under coverture, and could not confirm the original settlement, that the only thing which she could do was by deed duly acknowledged to convey her real estate. That argument I do not understand. The argument seems to be that she could deal with her real estate in favour of anybody, subject to this, that the only persons to whom she could not convey were the trustees to whom she had agreed to convey.

Solicitors for Plaintiff: *Thomas White & Sons.*
Solicitors for trustee: *Clarke, Woodcock, & Ryland.*
Solicitors for other Defendants: *Farrer & Co.*

D. P.

NORTH, J.
1888
Feb. 7.

In re WILLIAM DAVIES.
DAVIES *v.* DAVIES.

[1887 D. 717.]

Originating Summons—Jurisdiction—Question between Legal Devisees—Rules of Supreme Court, 1883, *Order* LV., *rr.* 3, 5, 6.

Upon an originating summons under rule 3 of Order LV., of the Rules of Supreme Court, 1883, there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust.

Consequently, there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will.

An objection to the jurisdiction upon an originating summons having been taken by the Defendants for the first time after the hearing of the summons had been adjourned into Court:—

Held, that the objection ought to have been taken in Chambers, and that, though the objection was good, and the summons must be dismissed with costs, the Defendants could not be allowed the costs of the adjournment into Court.

ORIGINATING SUMMONS by *John Davies*, who claimed to be a devisee under the will of *William Davies*, deceased, for an order declaring that, upon the true construction of that will, and in the events which had happened, certain messuages in the county of *Cardigan* were devised to and became vested in the Plaintiff, *John Davies*, and *Timothy Davies*, deceased, in fee simple as joint tenants and not as tenants in common. The devise to *John Davies* and *Timothy Davies* was a legal devise. The persons served with the summons were residuary devisees, and devisees in trust, under the will of *Timothy Davies*. Neither the trustees nor the executors of *William Davies* were served with the summons. The testator, *William Davies*, died in September, 1846. *Timothy Davies* died in July, 1876.

J. G. Wood for the Plaintiff.

Everitt, Q.C., and *Stutfield*, for the Defendants:—

There is no jurisdiction under rule 3 of Order LV., to determine a question between legal devisees upon an originating summons: *In re Carlyon* (1).

J. G. Wood, for the Plaintiff:—

There is nothing in the words of rule 3 to limit the jurisdiction to trust estates. The Plaintiff is a "devisee of a deceased person," and he claims the determination of a "question affecting the rights of a person claiming to be a devisee." Rule 5B, which provides that when the summons is taken out by any person other than the executors, administrators, or trustees, it is to be served on the executors, administrators, or trustees, does not cut down the preceding rule 3; it only means that, if there are any trustees, they are to be served. Here there are no trustees of the property in question, and all the persons who are interested in the question to be determined have been served.

At any rate this objection ought to have been taken in Chambers, and the Defendants should not be allowed the costs of the adjournment into Court.

NORTH, J.:—

The question which is raised by this summons arises between two legal devisees, viz. whether the devise to them was as joint

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(1) 56 L. J. (Ch.) 219.

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tenants or as tenants in common. In my opinion I have no jurisdiction under rule 3 of Order LV. and the following rules to deal with such a question. As I have already said, in *In re Carlyon* (1), the object of these rules was to afford an opportunity of obtaining a decision in a summary way of questions affecting the administration of an estate or a trust where it would previously have been necessary to have a decree or judgment for the administration of the estate or execution of the trust. Formerly, in order to obtain a decision of a single question arising in the administration of an estate, it was necessary to obtain a judgment for the general administration of the estate. The expense of this was felt to be a crying evil, and I am glad that the rules have provided a mode of avoiding that expense, and of obtaining a decision of any question affecting (*inter alia*) the rights of a person who claims to be a devisee, without a general administration of the estate of the testator or of the trusts of the will. Devisees are not deprived of the rights which are conferred on other persons, and any question which arises between a devisee and the executors or trustees of the will can be determined on an originating summons. But, in my opinion, these rules give no general power to determine any question arising between devisees and other persons, unless it is a question which would have arisen in the administration of an estate or execution of a trust. That, I think, is the proper construction of rule 3, looked at alone, and this view is borne out by rules 5A and 5B, which provide for the persons who are to be served with an originating summons. When the summons is not taken out by the executors or trustees it is to be served on them. Then rule 6 provides that the Court may direct such other persons to be served with the summons as it may think fit. No doubt the Court has jurisdiction to order other persons to be served, but still, in my opinion, the rules only apply to questions arising between the executors, administrators, or trustees on the one hand, and the person, be he creditor, or devisee, or next of kin, who sets up the claim, on the other hand. It may be necessary to serve other persons when the executors or trustees are only incidentally interested, but, in my opinion, the Court has no jurisdiction to decide any question which could not have been

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(1) 56 L. J. (Ch.) 219.

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determined under a judgment for the general administration of an estate or execution of a trust. I adhere to what I said in *In re Carlyon* (1). In that case I acted upon the submission of the parties, and at their request I decided the questions raised by the summons, but I pointed out that there could be no appeal from my decision. I must dismiss this summons, with costs. The question of jurisdiction was decided by me in *In re Carlyon* in December, 1886, and my decision was reported in the *Law Journal* in March, 1887. The objection to the jurisdiction in the present case might therefore have been taken in Chambers, and I shall not allow the Defendants any costs of the adjournment into Court. I know that Mr. Justice *Stirling* has expressed the same view of the construction of rule 3.

Solicitors for Plaintiff: *Helder & Roberts,* agents for *W. Morgan Griffiths, Carmarthen.*

Solicitor for Defendants: *Thomas Lovell,* agent for *Roberts, Son, & Evans, Aberystwith.*

W. L. C.

In re RANDELL.
RANDELL *v.* DIXON.

[1887 R. 991.]

NORTH, J.
1888
Feb. 9, 10.

Will—Construction—Charitable Legacy—Perpetuity.

A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at *H.* for the time being so long as he permitted the sittings to be occupied free: in case payment for sittings was ever demanded, she directed the £14,000 to fall into her residue:—

Held, first, that the testatrix had not expressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy-près*: secondly, that the direction that the fund should fall into the residue, being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities.

THIS was an originating summons to determine questions arising on the will and codicils of *Elizabeth Randell,* late of the

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(1) 56 L. J. (Ch.) 219.

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Oaks, Hawley, in the parish of *Yateley, Hants.* The will contained the following bequest and devise:—

"I give and bequeath the sum of £14,000 sterling free from legacy duty out of my pure personal estate, and on which the same shall after payment of the hereinafter-mentioned charitable bequests be a primary charge, to my cousin and godson *John Charles Randell*, of *Mark Lane*, in the city of *London*, and the Rev. *John Frewen Moor*, of *Ampfield, Hants*, their executors, administrators, and assigns, upon trust that they, the said *John Charles Randell* and *John Frewen Moor*, or the survivor of them, or the executor or administrator of such survivor, or other the trustees or trustee for the time being of this my will, do and shall lay out and invest the same sum in their or his names or name in the parliamentary stocks or public funds of *Great Britain*, or at interest on government or real securities in *England* or *Wales*, and do and shall from time to time alter, vary, and transpose the stocks, funds, or securities in or upon which the same sums shall for the time being be laid out or invested, for or into other stocks, funds, or securities of the same or a like nature. And in case the Rev. *John Ingram Penfold Wyatt*, the present incumbent of the district church of the *Holy Trinity*, at *Hawley* aforesaid, shall be such incumbent at my decease, do and shall during the incumbency, or during such part thereof as he shall permit all the sittings in the said district church to be occupied free of all claim for pew-rents, pay to him the interest, dividends, and annual proceeds arising from the said sum of £14,000, and the investments thereof, and from and after the determination of the said incumbency of the said *John Ingram Penfold Wyatt*, either by his death or otherwise, do and shall so long as his successors, incumbents of the said district church of the *Holy Trinity*, at *Hawley* aforesaid, shall permit all the sittings in the said district church to be occupied free of all claims for pew-rents, pay the interest, dividends, and annual proceeds of the stocks, funds, and securities in or upon which the said sum of £14,000 may be invested to the incumbent for the time being of the said district church. And I direct and declare that in case any such incumbent shall make any claim for and receive any such payment as aforesaid in respect of the occupation of any pews or sittings in the said district church, that from thenceforth the said trust moneys and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my residuary personal estate. I give and bequeath all that piece of arable land called *Red Lion Field*, situate at the rear of the "*Red Lion*" *Inn*, at *Blackwater*, in the county of *Hants*, and which contains about three acres, now in the occupation of the said *John Ingram Penfold Wyatt*, to the said *John Charles Randell* and the Rev. *John Frewen Moor*, their heirs, executors, administrators, and assigns, as trustees for the benefit of the said district church of the *Holy Trinity*, at *Hawley*, upon the same trusts and conditions as those respecting the said sum of £14,000 hereby bequeathed."

Two of the questions on which the decision of the Court was sought was "whether on the ground of perpetuity or otherwise the proviso in the will carrying over the bequest of £14,000 into the residue in a certain event is void," and whether the devise of the three acres was void under the *Statute of Mortmain.*

Medd, for the trustee of the will, the Plaintiff in the action.

Carson, for legatees.

G. F. Hamilton, for residuary legatees and devisees.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the incumbent of *Holy Trinity Church, Hawley*:—

The Court may perhaps be able to support the devise of the three acres under the *Church Building Act*, 43 Geo. 3, c. 108, on the ground that it is given for the purposes of glebe.

NORTH, J.:—I should like to look at the Acts relating to glebe, and will give judgment to-morrow on this point.

Medd, for the trustee:—

Another point on which it is desirable to take the opinion of the Court is, whether the gift over in case money is ever demanded for sittings is void, as leading to a perpetuity. There is not much authority on the subject. The case that seems most in point is *Christ's Hospital* v. *Grainger* (1).

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(1) 1 Mac. & G. 460.

NORTH, J.:—I do not see how I can decide that question now.

Feb. 10. NORTH, J.:—

Having regard to the fact that the question of the validity of the devise of the three acres given for the same object as the £14,000 has to be determined, I think I must now determine also whether the gift over of the £14,000 can take effect.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the incumbent:—

The testatrix has shewn such an intention to devote this £14,000 to charitable purposes, that if the particular purpose ever comes to an end, a scheme will be settled for the application of the fund *cy-près*.

The contingency on the happening of which the £14,000 is given over may happen beyond the period for which the testatrix could tie the property up. The gift over, not being in favour of a charity, is therefore void for remoteness.

NORTH, J.:—

For the purpose of deciding the question of the validity of the devise of the three acres of land, I think it necessary to deal with the gift of the £14,000 now, because the land in question, which is three acres, is to be held upon the same trusts and conditions as those respecting the £14,000. [His Lordship read the terms of the bequest of the £14,000, and continued:—] Under these circumstances it seems to me that there is a charity created for a definite limited time and no longer, and there is no general purpose of charity with respect to which a scheme could be made altering entirely the destination of the income of these investments. It seems to me startling to say that the Charity Commissioners might, if they pleased, make a new scheme for the application of this income in any way they pleased, possibly for the benefit of the incumbent and possibly not, and that when they have done that, although the very purpose for which the scheme is created, and for which the money is given, can no longer be carried into effect, yet the money is to be applied for a totally different purpose.

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I know no case exactly like it; but the case that most resembles it, I think, is one which came before the House of Lords not very long since, in which Lord *Clive* had devoted a sum of nearly £200,000 to provide pensions for officers and others, being Europeans, in the military or naval service of the *East India Company*, with a proviso, which took the form of a covenant in that case, that if at any time after 1784 the *East India Company* should cease to employ a military force and to use vessels for the purpose of trading, the money paid to them should be paid back to Lord *Clive* and his executors, administrators, or assigns. Somewhere about the year 1834, I think it was, they ceased to be a trading company employing ships. They continued to employ a military force until after the Indian Mutiny, when we know that the whole power of the *East India Company* to employ military troops was put an end to, and the Secretary of State succeeded to and performed the duty which previously the *East India Company* had performed. When that took place, in 1858, after the Indian Mutiny, the then legal personal representatives of Lord *Clive* filed a bill for the purpose of having it declared that the purposes for which that fund, which was obviously a charity in itself, was created, had come to an end, and the fund might be paid back to his family. When the case came before the Master of the Rolls in the first instance he held that there was a clear trust for a purpose, which beyond all question was a charitable purpose; but as soon as the time arrived at which it came to an end, the trust would have ceased, and the money would have been repayable to Lord *Clive* but for the fact that, as he held, the Acts of Parliament transferring the powers and property of the *East India Company* to the Secretary of State for *India*, had transferred this fund—this trust fund, as he called it—with its liabilities, and had cast upon the Secretary of State the same duties with respect to it which the *East India Company* had previously performed. Upon that ground, and upon that ground only, he thought that the trust had not come to an end, and that therefore the action failed. That case was carried to the House of Lords: *Walsh* v. *Secretary of State for India.* (1) It went direct to the House of Lords and not through the Court

(1) 10 H. L. C. 367.

of Appeal at that time; and the House of Lords took a different view. They said there was no trust fund appropriated. The money was given to the *East India Company*, and there was no trust fund set apart; it was mixed with their general funds, and they were not answerable for it as trust funds in their hands. The Act, therefore, transferring the property did not apply; but the liability was at an end, and at the end of upwards of eighty years after the time when the original charitable institution was formed it was held that the obligation to repay the money—not transfer the trust fund, because the House did not consider it to be a trust fund; but the covenant to repay the money—remained in force, and the money was handed back to the person who at that time had taken out representation to Lord *Clive* for the purpose of bringing that action. A part of the fund was not subject to that covenant, but the original gift of five lacs of rupees was subject to it, and the money was paid over. That seems to me a case very like the present. There was beyond all question a trust for charity for a limited period. There it was held that when the trust came to an end the money fell into the estate of Lord *Clive*. In the present case it seems to me that there is a definite, particular, special charitable bequest which must have effect given to it so long as it lasts, and no longer; and that when it comes to an end there is no devotion to general charitable purposes at all, the intention of the testatrix being distinctly the opposite. On the construction of the will, it is a charity for a particular limited purpose, and nothing beyond that is declared; as soon as that particular purpose comes to an end, the fund which was subjected to that particular trust falls into the residue of the estate; and it would do so just as much if there was no such limitation as this in the will, as it does when the limitation exists. The limitation is that, in that case, "the trust moneys, and the interest, dividends, and annual income arising therefrom shall fall into and be dealt with as part of my residuary personal estate." If she had said that it would fall into and form part of her residuary personal estate, she would simply have been saying what the law is; and saying that it shall do so is simply saying what the law would do without such a statement. In my opinion a direction that in a particular event a fund shall go in the way in which the law would make it go in the absence of such a direction, cannot be said to be an invalid gift, or contrary to the policy of the law. In my opinion, therefore, this direction means that the fund is to go as the law independently of that direction would give it, and therefore that gift is not obnoxious to any rule of law. That being so, it belongs (subject of course to the trust created) to the residuary legatees, and they take it just as they would take it if there were no gift, or if the gift failed for perpetuity. It goes to them as part of the estate of the testatrix. I shall therefore answer the question relating to the said £14,000 in this way, "that the direction in the will, in the events therein mentioned, that the trust moneys arising from the investment of the £14,000, and the interest, dividends, and annual produce thereof shall fall into and be dealt with as part of my residuary personal estate, is not void on the ground of perpetuity."

[His Lordship decided that the three acres had not been devised for a glebe, and that the devise was void.]

Solicitors: *Houseman & Co.; Maples, Teesdale & Co.; Reep, Lane & Co.*

D. P.

STIRLING, J.
1887
Dec. 15, 20.
1888
Feb. 1, 15.

In re BETHELL.
BETHELL *v.* HILDYARD.

[1885 B. 2119.]

English Domicil—Marriage in Bechuanaland according to the Customs of a Native Tribe—Polygamy—Marriage not in a Christian, but a Baralong sense invalid.

A union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of *England* unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others."

C. B., whose domicil was English, in 1878 went to *South Africa*, and afterwards resided at *Mafeking* in *Bechuanaland*. In 1883 he went through the ceremony of marriage with *T.*, a woman of the *Baralong* tribe, according to the customs of the tribe, among whom polygamy is allowed. *C. B.* and *T.* lived together as husband and wife. He was killed in the colony in 1884, and about ten days after his death *T.* gave birth to a female child. *C. B.*, in a document which he wrote and signed in 1883, made some provision for *T.* and for a child out of the proceeds of sale of his property in the colony. He refused to be married to *T.* in a church on the ground that he was a *Baralong*. He never mentioned the marriage to any of his friends in *England*, and there was no evidence that he ever introduced or spoke of *T.* as his wife, but that he called her "that girl of mine." He was in receipt of about £600 a year, the rents of estates in *England*, devised to him for life with remainder to his lawful child or children:—

Held, that the union of *C. B.* and *T.* was not a marriage in the Christian, but in the *Baralong* sense, and that it was not a valid marriage according to the law of *England*.

WILLIAM FROGGATT BETHELL, who died in 1879, by his will, dated the 28th of October, 1876, made a devise of his real estates (including leaseholds) at *Burnhill* and *Hallatreeholme* in the county of *York*. That devise the testator revoked by a codicil dated the 2nd of March, 1878, and instead thereof he thereby gave the same estates to trustees (the Defendants) to the uses and upon the trusts thereinafter expressed and declared, viz., upon trust to secure a rent-charge, and then to the use of his son *Christopher Bethell*, during his life, or until he should commit one of such acts as therein mentioned, and after the death of *Chris-*

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topher Bethell in case he should die leaving any child or children him surviving, to the use of the Defendants, their heirs and assigns, upon trust for sale. The testator then declared that the trustees should stand possessed of the moneys arising from such sale for the child of *Christopher Bethell* if only one, or for his children if more than one, in equal shares, but in case *Christopher Bethell* should die without leaving any child or children him surviving, or without leaving any child or children who should attain the age of twenty-one years, then the testator made a devise of the said estates in favour of his eldest son *William Bethell* (the Plaintiff) during his life.

Christopher Bethell left *England* for the *Cape of Good Hope* in the year 1878, and never returned to this country. He died in *South Africa* on the 30th of July, 1884, having been on that day killed in fighting with the *Boers* in *Bechuanaland.* Some time after the death of *Christopher Bethell, William Bethell* took out an originating summons in this matter, in which the trustees (the Defendants) of the testator's will were Respondents, asking for a declaration that he was entitled to the property on the ground that *Christopher Bethell* had died without leaving any issue, and on the 12th of June, 1885, an inquiry was directed whether *Christopher Bethell* was ever married, and if so, when, and to whom, and whether he left any, and what children him surviving, and when they were respectively born. The Chief Clerk in answer to that inquiry made a certificate that *Christopher Bethell* in October, 1883, being then a resident at *Mafeking* in *Bechuanaland,* went through the form of marriage according to the custom of the *Baralong* tribe with *Teepoo,* a *Baralong* girl, and had issue by her a female child who was born ten days after his death; that the *Baralongs* had not any religion, nor any religious customs, and that polygamy was allowed in that tribe; that at the time of the marriage the domicil of *Christopher Bethell* was English, and that, save as aforesaid, he never was married. Upon that certificate the matter came on to be heard upon further consideration. It was then considered desirable that the infant child mentioned in the certificate should be represented; and in order that that might be done the official solicitor was appointed her guardian, and notice of the order of the 12th of June, 1885, was served upon him in accordance with Rules of Supreme Court, 1883, Order XVI., rule 44, and Order IX., rule 4. The infant had appeared by her guardian, who had taken out a summons asking that the certificate might be varied by finding that *Christopher Bethell* was married to *Teepoo*, and left one child him surviving, a girl born on the 9th of August, 1884. The evidence, which had been taken by commission in *Bechuanaland*, was to the effect that *Christopher Bethell* refused to be married in a church, though, as stated, there was a Wesleyan church at *Mafeking*, and a minister; and also an English church and a clergyman at *Kimberley*, a large English town not very far off; that he did not intend to remain in *Bechuanaland*, but to return to *England;* that in none of his communications to his relations or friends had he intimated or led them to infer that he was married; and that he called *Teepoo* "that girl of mine." It was also in evidence that "each male is allowed one great wife and several concubines, who have almost the same *status* in the home as the great or principal wife." And *Montsioa* the chief of the tribe said:—"There are those who have two, three, or four wives, but the first is the principal wife." The marriage ceremony was thus described:—"When the consent of the parents has been obtained, the bridegroom slaughters a sheep, a buck, an ox, or cow. The head of the animal is taken to the bride's parents, as also is the hide, which is cleaned and softened. They are then considered married, and after the birth of the first child the number of the cattle previously agreed upon is handed over to the wife's parents." *Christopher Bethell* in October, 1883, went through that ceremony with *Teepoo*, a niece of *Montsioa*, who in his depositions gave this account of what took place:—

"*Bethell* came to me and said he wanted a woman to take and marry according to the *Baralong* custom. I said to him, 'You know we *Baralongs* have a different custom from other tribes. The custom is that during courtship and after marriage, the man, when he kills an ox, sends the head to the girl's mother, so if you do this the mother will know your intentions are honourable.' *Bethell* said:—'Well, I want to marry a *Baralong*, and I will do so according to *Baralong* custom;' also 'I am a *Baralong*,' I said, 'Will you not marry her in church?' He said, 'No; I am a *Baralong*; did you marry your wife in church, did you not also marry in the custom I am about to do?' I said, 'Very well, if that is the case you can take one,' and of a truth he did take one. He slaughtered an ox, and sent the head to *Makwas*, the mother of *Teepoo*. I then went to *Makwas*, and said, 'Give your daughter to *Bethell*; you see he really means it. See, he has sent you the head.' She did, and he married her exactly in accordance with our customs. There is no other ceremony except taking the girl. The paying of cattle is no part of the ceremony of marriage, and may be done years after the consummation of the marriage. *Bethell* took the girl to his house. *Bethell* gave a span of oxen and trekgoed and plough to *Teepoo*'s father, saying, 'Plough *Makwas's* garden with this.' It is one of our customs for the son-in-law to plough the mother-in-law's garden, or have it ploughed. I know that *Bethell* really married *Teepoo*, and that she was his wife and not his paramour." On the 3rd of December, 1883, *Christopher Bethell* wrote and signed the following document making some provision for *Teepoo* and any child she might have by him:—

"I hereby desire that in the event of my decease here in *Mafeking*, and in the absence of any other will, Mr. *E. Rowland* shall take over all my arms, ammunition, cannon wagon, oxen, horses and any other property that may be in my possession, and shall sell them to the best advantage. I desire that he will realize all the property as quickly as possible, and shall apply the proceeds to the payment of *Taylor & Leark's* (*Klerksdup*) account, the balance he shall have and hold as a bequest and present from me. And he shall inform my relatives in *England* of my decease and of the manner in which my property is disposed of. Always providing that before disposing of any of the proceeds of the sale of my property he shall purchase or put aside (30) thirty heifers, (10) ten three years old, (10) ten two years old, (10) ten one year old, and shall use them for the benefit of *Teepoo* in the following manner—he shall keep the heifers for the space of one year from my decease, and in case she (*Teepoo*) has no child by me he shall hand the said (30) thirty heifers over to her for her own property and use. If she has a child after my decease, he shall keep the heifers and their produce until the said child be arrived at the age of (21) twenty-one years, selling any full-grown oxen and old cows, and investing the proceeds in land or English Government securities. The milk of the cattle and the use of the young oxen to be applied to the use of *Teepoo* and the child. At the end of eight years the child is to be removed from its mother and placed at a school for the time of ten years, either in the colony or in *England*, and if a boy shall be taught a profession, or enter Her Majesty's service as a soldier. In order to repay the work of Mr. *Rowland* in the case of a child being born I desire that he shall take (20) twenty per cent. of all sales of oxen and cows as before mentioned. In case *Teepoo* remarries or has any more children or conducts herself in an improper way, she shall be debarred from any participation in the heifers and shall give up the guardianship of the child at once to *E. Rowland* and shall receive 10 yearly heifers only as a dowry. But in case she have no child by me at the expiration of the year, she will be at liberty to do as she likes and will receive the (30) thirty heifers as before mentioned. And *Ragnassie*, her father, shall receive eight young heifers as dowry, and thereby relinquishes by *Bechuana* law all command over *Teepoo* and the child.

"In token my hand, *C. Bethell.*

"Which can, if necessary, be verified by the *Standard Bank* (*Limited*)."

Further evidence is stated in the judgment.

W. Pearson, Q.C. (*George Williamson*, with him), for the Plaintiff, stated the facts: and submitted that the onus of proving a valid marriage was upon the infant; and see *In re Bethell, Bethell* v. *Bethell* (1).

Hastings, Q.C., and *Byrne*, Q.C., for the infant:—

On the facts and on the evidence taken in *Bechuanaland* the question to be decided is, whether the marriage of *Christopher Bethell*, a domiciled Englishman, in a foreign country with *Teepoo*, a woman of a native tribe, was good and valid, notwithstanding polygamy may prevail there. A marriage celebrated abroad according to, and valid by the *lex loci* is valid everywhere: *Dalrymple*

(1) 34 Ch. D. 561.

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v. *Dalrymple* (1); and Lord *Wensleydale* in *Brook* v. *Brook* (2) said: "It is the established principle that every marriage is to be universally recognised, which is valid according to the law of the place where it was had, whatever that law may be."

This was the doctrine of Lord *Stowell* in the case of *Herbert* v. *Herbert* (3), and Lord *Campbell* said (4): "Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicil, the marriage may be good everywhere." Now is that applicable to a marriage in a place which may be described as an uncivilized country?

[STIRLING, J.:—The question is whether the relationship as described by the chief of the tribe is a marriage at all.]

The law of *England* recognises the principle in those cases as applicable, even though a marriage may be solemnized in a country where the people are not so highly civilized as in *England*; ? and where the practice of polygamy may obtain. The Court cannot distinguish between a marriage of an Englishman in the *Baralong* country and a marriage of an Englishman in *Turkey*. According to the law of *Ceylon*, as in *England*, where a man and woman are proved to have lived together as husband and wife the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage: and those who claim by virtue of the marriage are not bound to prove that all necessary ceremonies have been performed: *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (5). The question there was whether there had been a valid marriage between two *Tamils* in *Ceylon*, where (6) "if the rice ceremony is performed it is a marriage." Then there is the case of *Connolly* v. *Woolrich* (7). *Connolly*, a Christian, who never lost his domicil of birth in *Lower Canada*, went to and did reside in the *North-West Territories* for thirty years, and there married an Indian woman of the *Cree* Indians, who were pagans, and the Court held that the marriage was valid notwithstanding the assumed existence of polygamy, and divorce at will obtained.

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(1) 2 Hagg. Cons. Rep. 54.
(2) 9 H. L. C. 193, 241.
(3) 2 Hagg. Cons. Rep. 271.
(4) 9 H. L. C. 207.
(5) 6 App. Cas. 364.
(6) Ibid. 366.
(7) 11 Low. Can. Jur. 197 (1867).

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And in *Johnson* v. *Johnson's Administrator* (1) and 1 *Bishop* on Marriage and Divorce (2), we find the case of a white man cohabiting with an Indian woman in an Indian country, and having children born there. He afterwards brought them away to *Missouri*, but left the mother behind. The question was whether they were, and could be recognised as, legitimate in *Missouri*. That depended upon whether legally the father was the husband of the mother. The lower Court before which the case was tried instructed the jury that unless the agreement of the parents was to live their whole lives together in a state of union, as husband and wife, it was not a marriage, nor were the children of such union capable of inheriting from the father: but on appeal the instruction was held to be wrong, being too restrictive, and would operate to nullify all Indian marriages. Judge *Napton* said: "In most of the tribes, perhaps in all, the understanding of the parties is, that the husband may dissolve the contract at his pleasure," and "It is plain that, among the savage tribes on this continent, marriage is merely a natural contract, and that neither law, custom, nor religion has affixed to it any conditions, or limitations, or forms, other than what nature has itself prescribed." The decisions in those cases come to this, that the rule as to marriage being valid, in a foreign country—in *Germany* for instance—is valid everywhere, and the Courts here are in the habit of looking at them as useful guides in applying the law to the case under consideration. A Turkish subject came to *England* and married an English lady, and the marriage was held to be good and valid: *Colliss* v. *Hector* (3). Assuming there was a marriage in *Bechuanaland*, then comes the question whether it involves polygamy, and will not be recognised in this country. The proposition which the Plaintiff will have to rely upon is that every marriage which is celebrated in a country where polygamy is recognised or obtains is a marriage involving polygamy, and if that should be held to be a true proposition there is an end of the infant's case. But did *Christopher Bethell's* marriage involve polygamy? If he had gone through another marriage that would have been polygamous. If a man embraces a faith a tenet of which is that

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(1) 30 Missouri State Rep. 72.

(2) 6th Ed. 1881, p. 223.

(3) Law Rep. 19 Eq. 334.

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polygamy is lawful, if he becomes a Mormon or a Mahommedan, and marries, that would involve polygamy, but if an Englishman marries in *Turkey*, or in the territory of the *Baralongs*, however absurd or grotesque the ceremonies may be, and intends to live, and does live, with his wife to the exclusion of every other woman, ✓ how that can be called polygamy it is difficult to comprehend, at any rate there is no decision in favour of such a proposition. An Englishman goes to a colony and resides among a native tribe where polygamy prevails, and there goes through the form of marriage, and what possible reason is there for saying that it is not a good and valid marriage? It is submitted that there is none. In *Dalrymple* v. *Dalrymple* (1) Lord *Stowell* said: "Marriage, in its origin, is a contract of natural law. . . . . It is the parent, not the child, of civil society." In certain cases "marriages will be allowed to be valid according to the law of the native, or of fixed actual domicil:" *Story* on Conflict of Laws (2). "Where a marriage valid according to the *lex loci actus* is impossible, from the want of any such law applicable to the case, parties may marry with the forms, so far as it is possible to observe them, and with the consents, respectively required by their own law": *Westlake's* Private International Law (3).

Christopher Bethell intended to, and did, enter into a contract of marriage. He wrote in the document of the 3rd of December, 1883, "In case *Teepoo* remarries." It cannot be contended that he could not enter into the contract however grotesque the ceremony gone through may appear to be. Mr. Justice *Story*, in his Conflict of Laws (4), while he admits it to be the rule that a marriage valid where celebrated is good everywhere, says (5) there are exceptions; those of "marriages involving polygamy and incest." ✓ Does the exception of polygamy void this marriage? There is no authority in support of that proposition, and there seems to be no reason for it. Lord *Stowell* in *Ruding* v. *Smith* said (6): "It is true, indeed, that English decisions have established this rule, that a foreign marriage, valid according to the law of the place where celebrated, is good everywhere else; but they have not *è converso* established, that marriages of British subjects, not good according to the general law of the place where celebrated, are universally, and under all possible circumstances, to be regarded as invalid in *England*. It is therefore, certainly, to be advised, that the safest course is always to be married according to the law of the country, for then no question can be stirred;" and the cases of *Scrimshire* v. *Scrimshire* (1); *Harford* v. *Morris* (2); *Middleton* v. *Janverin* (3), also bear upon the point. To maintain that the marriage was invalid it must be made out by the Plaintiff that it was celebrated with the intention on the part of *Christopher Bethell* of having the advantage of being able to avail himself of the law or custom which allowed polygamy. His conduct subsequent to the marriage, and his writing and signing the document of the 3rd of December, 1883, in which he made provision for a child which was contemplated, was in accordance with English law, and quite consistent with an honest intention to treat it as a valid marriage. It would have been dishonest if he had treated the marriage as being invalid; and it would be a startling proposition to make that in a country ✓ where polygamous marriages are allowed a domiciled Englishman cannot marry without the marriage involving polygamy. If *Christopher Bethell* had been a *Baralong* the infant would be legitimate: *In re Goodman's Trusts* (4). He must have intended to give the marriage with *Teepoo* all the characteristics of an English marriage. He solemnly said that he had married her, and they lived together as man and wife. It was in every sense an English marriage, and the Court will not impute to him that he intended to take any advantage of the practice of polygamy.

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(1) 2 Hagg. Cons. Rep. 63.

(2) Ed. 1883, p. 198, s. 118.

(3) Ed. 1880, p. 57, s. 23.

(4) § 113.

(5) § 113*a*.

(6) 2 Hagg. Cons. Rep. 371, 390.

Under all the circumstances of the case it would be a strong thing to say that he merely intended to form a simple union which he intended to throw over at a future time. Can it be contended that if after the marriage with *Teepoo* he had contracted a marriage with a woman in this country that would not have been bigamy?

[STIRLING, J.:—The question is, was it a marriage in an English sense?]

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(1) 2 Hagg. Cons. Rep. 395.

(2) Ibid. 423.

(3) 2 Hagg. Cons. Rep. 437.

(4) 14 Ch. D. 619.

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Supposing there had been no evidence in the case except that *Christopher Bethell* had gone through a native marriage, had cohabited with his wife, and had left a child, that, it is submitted, would have been conclusive, without any other evidence of the legitimacy of the child, and unless the Plaintiff can shew something against the propositions advanced on behalf of the infant; and it is submitted that he can shew no authority against them; she should be held to be entitled to the estate.

[The cases of *Warrender* v. *Warrender* (1), *Piers* v. *Piers* (2), *Shaw* v. *Gould* (3), *Hyde* v. *Hyde and Woodmansee* (4), and *Harvey* v. *Farnie* (5), were also referred to.]

W. Pearson, Q.C., and *G. Williamson,* for the Plaintiff:—

The claim on behalf of the infant that there was a valid marriage, and that she is the legitimate child of *Christopher Bethell,* and therefore entitled to take under the will, has failed. To establish the legitimacy of the child it must be proved that her father and mother were united in a manner which the English law alone recognises. The meaning of the word "marriage" in this country is perfectly plain; but certain forms and ceremonies are required by law for the purposes of evidence. In Christian countries marriage is the union of one man and one woman exclusively for the whole period of life: *Hyde* v. *Hyde and Woodmansee;* and there must be a mutual interchange of consent by the two persons. Unless there be an interchange of consent there cannot be that which English law recognises as marriage. Was there such an interchange of consent between *Christopher Bethell* and *Teepoo*? The *Baralong* tribe have not laws but only customs when they marry. A marriage solemnized according to the *lex loci* the law of this country will recognise: *Dalrymple* v. *Dalrymple* (6); but if not so solemnized then it is not recognised. There are foreign states, some of which are Christian and some not. Some recognise that which this country calls marriage, and others merely a connection, but that is a different thing from an English marriage. If a British citizen contracts a marriage at a mosque

(1) 2 Cl. & F. 488.
(2) 2 H. L. C. 331.
(3) Law Rep. 3 H. L. 55.
(4) Law Rep. 1 P. & M. 130.
(5) 6 P. D. 35; 8 App. Cas. 43.
(6) 2 Hagg. Cons. Rep. 54.

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with an Englishwoman, that would not be, according to English law, a marriage. In *Turkey* or other countries an English marriage can take place before an ambassador or consul. Christians marry according to the rites of the Christian Church established in those countries, and the marriages are held to be valid in this country: *Warrender* v. *Warrender* (1). There may be a state in which Christianity is not tolerated, in which *England* has no representative, and where there is no Christian minister and no church, but even there, if there be an intention to contract a Christian marriage, and an interchange of consent to accept each other in a Christian sense, it will be held, upon the principle of "necessity," a marriage. No such intention, however, is shewn in this case, and the principles laid down in *Ruding* v. *Smith* (2), a case referred to by Sir *W. Page Wood*, V.C., in *Armitage* v. *Armitage* (3), do not apply. An Englishman takes his English common law with him. Was it possible for any domiciled Englishman to contract a marriage unless under or by means of his common law right, and in the presence of an ordained minister? *Beamish* v. *Beamish* (4); *Reg.* v. *Millis* (5). If a person marries in a civilized country, then the *lex loci* governs the case, but how far an Englishman can carry into a savage land his own common law rights is shewn in the case of *Rex* v. *Inhabitants of Brampton* (6).

Upon these principles the case must be decided. The facts of actual marriage and interchange of consent, which this country recognises, have not been established. A Christian marriage cannot be inferred from the ceremony which was gone through. It has not been shewn that there was any case of "necessity," even if the parties intended to contract a Christian marriage, in the mode and form in which it was done. The cases of *Johnson* v. *Johnson's Administrator* (7), and *Connolly* v. *Woolrich* (8), were not determined in accordance with English law and have no bearing upon this case.

In *Johnson* v. *Johnson's Administrator* the question of fact and

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(1) 2 Cl. & F. 488, 531, 535.

(2) 2 Hagg. Cons. Rep. 371.

(3) Law Rep. 3 Eq. 343.

(4) 9 H. L. C. 274.

(5) 10 Cl. & F. 534.

(6) 10 East. 282.

(7) 30 Missouri State Rep. 72.

(8) 11 Low. Can. Jur. 197 (1867).

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evidence was one only in reference to *Johnson's* marriage with an Indian woman, and whether it could be inferred that some ceremony of marriage took place between them.

The case of *Connolly* v. *Woolrich* (1) is of no authority in this country. It was decided upon the old French and Canon laws. The "necessity" there was shewn to be absolute, as there was no minister nearer than 3000 miles away: *Armitage* v. *Armitage* (2); *Ruding* v. *Smith* (3), and *Westlake* on Private International Law (4).

The case of *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie* (5) has no bearing on this case whatever. The question of ceremony as constituting a Christian marriage did not arise in that case: *Story's* Conflict of Laws (6).

It is submitted that from the proved facts the Court cannot assume, having regard to the place where the marriage took place, that any consents were interchanged. There is certainly no evidence of any such interchange as in a Christian marriage. There was merely a sexual relationship between *Christopher Bethell* and *Teepoo*, and it is submitted that the only inference which the Court can draw from the facts is that there was an intention by both parties that it was to be such a connection as usually exists in the *Baralong* tribe, and in accordance with their customs. The ceremony was a *Baralong* one, and none other.

There must be mutual consent: *Warrender* v. *Warrender* (7). What did *Teepoo* consent to? Certainly not to a Christian marriage. She became one of the wives whom *Christopher Bethell*, residing in *Bechuanaland*, might have, and to live with him all her life. There was no contract to be his wife exclusive of every other woman. The Court cannot, in regard to assents, assume more than the forms and ceremonies of the marriage import. There is no question of "necessity" in this case. That is shewn by the fact that there was a missionary at *Mafeking*. As to intention, there was the refusal by *Christopher Bethell* to marry in a church, and also his statement that he was a *Baralong*, and would take a wife according to their customs. It is clear, from the evidence, that he did not intend to remain in the colony but to return home; and that in none of his communications to his friends at home did he intimate that he was married. Can it be supposed for a moment that he intended to bring *Teepoo* home as his lawful wife? Certainly not. The summons ought to be dismissed; and a declaration made in favour of the Plaintiff's title to the estates.

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(1) 11 Low. Can. Jur. 197 (1867).

(2) Law Rep. 3 Eq. 343.

(3) 2 Hagg. Cons. Rep. 371.

(4) Ed. 1880, p. 57, s. 23.

(5) 6 App. Cas. 364.

(6) Ed. 1883, p. 198, s. 118.

(7) 2 Cl. & F. 488.

Borthwick, for the Defendants, the trustees of the will.

Hastings, in reply.

1888. Feb. 15. STIRLING, J. (after stating the facts, continued):—

The question thus raised is whether a marriage valid according to English law took place between *Christopher Bethell* and *Teepoo*, and it has been very fully and ably argued by counsel on behalf both of the infant and of *William Bethell*. The facts which gave rise to it, so far as the same appear by the evidence, are shortly these: *Christopher Bethell*, who left *England* in 1878, was, shortly after his arrival in *South Africa*, appointed British Resident with *Montsioa*, the chief of the *Baralongs*, a barbarous or semi-barbarous tribe who inhabit a portion of *Bechuanaland* beyond the limits of the British dominion. That appointment was afterwards cancelled, but he continued to reside among the *Baralongs*, and became a storekeeper at *Mafeking* within their territory. Upon the breaking out of disturbances in *Bechuanaland* he joined the *Bechuana* mounted police, a corps in the employment of the British Government, and he met with his death in an encounter between that force and the Boers. At the time of his death a commission appointing him to a command in the corps had been made out, and was on its way to him, but he did not actually receive it.

As was found by the Chief Clerk polygamy prevails among the *Baralongs*. According to one witness "Each male is allowed one great wife and several concubines, who have almost the same status in the home as the great or principal wife." And the chief of the tribe said: "There are those who have two, three, or four

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wives, but the first is the principal wife." The marriage ceremony is thus described. [His Lordship read the evidence set forth above, and continued:—]

Christopher Bethell in October, 1883, went through that ceremony with *Teepoo*, a niece of *Montsioa*, who gave an account of what took place. [His Lordship read the depositions of the chief set forth above].

On the 3rd of December *Christopher Bethell* wrote and signed a document. [His Lordship read it, and continued:—]

Christopher Bethell kept up communication with various members of his family down to shortly before his death. He from time to time expressed his intention to return to *England*; and that portion of the Chief Clerk's certificate which finds that his domicil was English has not been excepted to. He never mentioned the marriage to any of his relatives; and there is no evidence that he ever introduced *Teepoo*, or spoke of her to any European, as his wife. One of the witnesses stated that he always called her "that girl of mine." Although it was not formally in evidence, it was stated at the Bar, and the statement was accepted by counsel on behalf of the infant, that the contents of the testator's will were communicated to *Christopher Bethell* shortly after his father's death in 1879; and that the income of the property, amounting to about £600 a year, was regularly remitted to him down to the time of his death.

I have now to inquire what is the law applicable to the case. In *Warrender* v. *Warrender* (1) Lord *Brougham* said (2): "A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be: Did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract." This is the general rule of law and is relied on by the counsel for the infant. His Lordship, however, afterwards qualifies his statement of the rule as follows: "The rule extends, I apprehend, no further than to the ascertaining of the validity of the contract, and the meaning of the parties, that is, the existence of the contract and its construction. If indeed there go two things under one and the same name in different countries—if that which is called marriage is of a different nature in each—there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard it as a wholly different thing, a different *status* from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. . . . Indeed if we are to regard the nature of the contract in this respect as defined by the *lex loci*, it is difficult to see why we may not import from *Turkey* into *England* a marriage of such a nature as that it is capable of being followed by and subsisting with another, polygamy being there of the essence of the contract." That statement of the law was acted upon by Lord *Penzance* in the case of *Hyde* v. *Hyde and Woodmansee* (1), in dealing with the case of a Mormon marriage celebrated at *Salt Lake City*. He there says (2): "The matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy" and (3), "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

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(1) 2 Cl. & F. 488.
(2) 2 Cl. & F. 530–533.

I conceive that, having regard to these authorities, I am bound to hold that a union formed between a man and a woman in a foreign country, although it may there bear the name of a marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of *England* unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others." Now it is plain that *Christopher Bethell* intended that *Teepoo* should have a status different from and higher than that of a mere concubine. Indeed the attempt to form such a connection with any woman of the tribe, and still more with one nearly related to its chief, would probably have been attended with unpleasant, not to say dangerous consequences. The evidence clearly proves that *Christopher Bethell* intended that the relationship between himself and *Teepoo* should at least be that of husband and wife in the sense in which those terms are used among the *Baralongs.* That relationship, however, is essentially different from that which bears the same name in Christendom, for the *Baralong* husband is at liberty to take more than one wife; and it must therefore be determined whether the union between *Christopher Bethell* and *Teepoo* was a marriage in the Christian or merely in the *Baralong* sense. In my opinion the latter alternative is the conclusion to be arrived at upon the evidence before me. To begin with, the cohabitation between *Christopher Bethell* and *Teepoo* lasted for only a few months. During that time both resided in the *Baralong* country. *Christopher Bethell*, although he kept up communication with his relatives at home, never mentioned his marriage to them. He never introduced *Teepoo* or spoke of her to any European as his wife. In short there is an entire absence of that reputation of marriage (in the Christian sense) which has in many cases afforded weighty evidence of the actual existence of such a union. Next it is to be observed that *Christopher Bethell* positively and emphatically refused to marry *Teepoo* in church, and that not on the ground that there was any difficulty in finding a place of religious worship where the marriage ceremony might have been performed, but upon the allegation, which he repeated more than once, that he was a *Baralong*, and wished to be married according to *Baralong* customs. He thus desired to be regarded as being, for the purpose of the relationship he was about to form, a member of the tribe. I think that the proper inference is that he meant to enter into no higher or other union than that which between members of the tribe was regarded as a marriage. This conclusion appears to me to be strongly confirmed by the document of the 3rd of December, 1883. It can scarcely be supposed that if *Christopher Bethell* regarded his union with *Teepoo* as a marriage, in the sense in which it is understood among Englishmen, and the child, referred to in that document, as legitimate, he would have made such provisions as are therein contained for the maintenance, education, and advancement in life of the child. He was in receipt of an income of £600 a year from an estate in *Yorkshire*; and he knew of the provisions of his father's will, under which a legitimate child of his would succeed to the property; yet he directed that his child by *Teepoo* should be maintained and educated up to the age of twenty-one on the proceeds of thirty heifers to be purchased out of the proceeds of a sale of his property at *Mafeking*, to be effected by his friend Mr. *Rowland*, who was a resident among the *Baralongs*. It is true that he speaks of the "re-marriage" of *Teepoo*, and makes provision for the "dowry" to be received by her, and by her father; but in my opinion he used those terms in the sense in which they were understood among the *Baralongs*, and his instructions were directed simply to ensure the fulfilment of obligations which he conceived to be cast upon him by their laws or customs. Finally, *Teepoo* herself has given no testimony in this case. No doubt the evidence was completed before her child was made a party to the cause, but I should willingly have listened to any application on the infant's behalf for leave to adduce further evidence. No such application has been made; and there is nothing to shew that *Teepoo* regarded herself as entering into any other union than such as prevails among the tribe to which she belongs, or that she would have been, or would have considered herself to be, aggrieved if *Christopher Bethell* had availed himself of the *Baralong* custom and introduced a second or third wife into his household. I am, therefore, of opinion that the union between *Christopher Bethell* and *Teepoo* was a marriage in the *Baralong* sense only, and was not a valid marriage according to the law of *England*. In the view which I have taken it is unnecessary for me to express an opinion on many of the numerous points relating to the law of marriage which were discussed before me, but I ought, perhaps, to refer to two cases which were cited in support of the contention on behalf of the infant, viz., *Johnson* v. *Johnson's Administrator* (1) and *Connolly* v. *Woolrich* (2). Those decisions are not, of course, binding upon me, but they are entitled to most respectful consideration, and in the absence of direct English authority might have exercised a weighty influence upon my decision. The former of those cases was decided in 1860, before *Hyde* v. *Hyde and Woodmansee* (1), and in the latter judgment was given on the 9th of July, 1867, but *Hyde* v. *Hyde and Woodmansee*, which was decided on the 20th of March, 1866, was not referred to. I am not sure that the learned Judges who decided those cases took the same view of the law as is expressed by Lord *Penzance*, by which I consider myself to be bound; but in both cases the facts were very different from those in the present case; and circumstances were proved which might, in my judgment, well lead to the conclusion, consistently with the doctrine laid down in *Hyde* v. *Hyde and Woodmansee*, that the marriages there under consideration were valid according to the law of *England*. The summons taken out on behalf of the infant must be dismissed, but the costs of the infant will be paid out of the estate. Beyond that I have no power to make any order; but I cannot refrain from again expressing the hope that the members of the family who, under this decision, will succeed to the property of which *Christopher Bethell* was tenant for life, will deem it to be their duty to make an adequate provision for one who, whatever may be her legal status, is undoubtedly the child of a very near relative.

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(1) Law Rep. 1 P. & M. 130.

(2) Law Rep. 1 P. & M. 135.

(3) Law Rep. 1 P. & M. 133.

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(1) 30 Missouri State Rep. 72.

(2) 11 Low. Can. Jur. 197.

Solicitors: *A. R. Oldman & Clabburn*, agents for *H. W. Bainton, Beverley; H. L. Pemberton*, Official Solicitor.

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(1) Law Rep. 1 P. & M. 130.

T. F. M.

C. A.
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BADELEY *v.* CONSOLIDATED BANK.

[1884 B. 1819.]

Partnership—Share of Profits—Advance to carry on Business—Bovill's Act (28 & 29 *Vict. c.* 86), *s.* 5 [*Revised Ed. Statutes, vol. xiv., p.* 1142]—*Garnishee Order—Equitable Charge—Notice—Priority.*

Participation in profits, although strong evidence, is not conclusive evidence of a partnership. The question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties.

The Plaintiff advanced money to a contractor to enable him to carry out a contract with a railway company for the construction of a railway, and the parties executed a deed by which the contractor assigned to the Plaintiff all his machinery, plant, &c., and all shares and debentures he might receive from the company to secure the repayment of the loan. The deed contained the following provisions: (1) that the Plaintiff should receive 10 per cent. interest on the money advanced and 10 per cent. of the net profits of the contract; (2) that the contractor should apply all the moneys advanced in carrying on the works; (3) that if the contractor should become bankrupt the Plaintiff might enter and complete the works; (4) that the Plaintiff might sell the property in case of default, but that he should not sell the shares or debentures within twelve months after the completion of the contract; (5) that in calculating the net profits the contractor should be allowed to draw out £1000 a year for his services. Letters passed between the Plaintiff and the contractor in which the money advanced was spoken of as "capital" and "working capital," and expressions were used shewing that both parties had a common interest in the works:—

Held (reversing the decision of *Stirling*, J.), that the stipulations in the deed and the expressions in the correspondence were all consistent with the object of securing repayment of the money advanced, and were not sufficient evidence of a partnership between the parties.

Held also (affirming the decision of *Stirling*, J.), that an action to enforce a security given by a trader who has become bankrupt is not an action to recover principal, profits, or interest within the 5th section of *Bovill's Act*, and may therefore be maintained by a person entitled to receive a share of the profits of a trader, although the other creditors of the trader have not been satisfied.

Held also (affirming the decision of *Stirling*, J.), that a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. Therefore an equitable charge, obtained before a garnishee order, takes priority of the order, even where no notice of the charge was given.

THIS was an appeal from a judgment of Mr. Justice *Stirling* (1). The facts, which are given more fully in the previous report,

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(1) 34 Ch. D. 536.

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were, so far as they are necessary for the present report, shortly as follows:—

In the year 1878 *J. M. Smith* contracted with the *Bury and Tottington District Railway Company* for the construction of their railway. To enable him to perform this contract he obtained advances from the Plaintiff, *John Badeley.*

The Plaintiff had in the year 1877 supplied him with money to carry out a contract with the *Great Western Railway Company*, which was secured by an assignment of the benefit of the contract dated the 23rd of May, 1877.

In order to secure the present loan *Smith* executed an indenture dated the 4th of July, 1878.

By that indenture, after reciting the contract with the railway company, and that *Smith* was entitled to certain policies of insurance and was about to commence the construction of the railway and the works thereof, and that for the purpose of the said works and for the performance of the said contract *Badeley* had agreed to advance him £1500, upon having such advance and any further advances made by him to *Smith* for the same purpose secured in manner thereinafter appearing; and that it had been agreed that *Badeley* should receive in respect of such advance interest at the rate of 10 per cent. per annum payable as thereinafter mentioned, and as a further consideration for such advances it had been agreed that he should also receive one-tenth part of the net profits arising from the performance of the contract, such net profits to be ascertained in manner thereinafter appearing: It was witnessed that *Smith* covenanted to pay £1500 at the expiration of six months from the date of the deed, and also that he would within six calendar months from the time or times of the same respectively being advanced or becoming due, pay to *Badeley* such other moneys, if any, as might be advanced to or on account of, or might become due from, *Smith,* with interest thereon at the rate aforesaid from the time or times of the same respectively being advanced or becoming due. And the same indenture contained an assignment by *Smith* of all principal moneys and interest, shares, bonds, and debentures whatsoever, and all dividends and interest upon any such shares, bonds, and debentures, which *Smith* might at any time receive or become entitled to receive from the company under the contract or agreement, and of all the materials, stock, &c., belonging to *Smith* which then were or thereafter might be in or upon the railway or works, and also the policies of insurance which were mentioned in the recital. Then followed covenants by *Smith* that he would duly and with all proper dispatch make, carry on, and complete the works, and duly apply and employ all moneys which had been or might be advanced by *Badeley* for the purposes of the works, or other the purposes for which the same were advanced, and would perform all the agreements and provisions in the contract on the part of him, the said *J. M. Smith*, to be performed. The deed contained power to *Badeley* in case of *Smith* becoming bankrupt to enter and seize all or any part of the works and the plant thereby assigned, and to carry on and complete the works: and also a power of sale, with a proviso that any shares, bonds, or debentures should not be disposable until the expiration of twelve calendar months from the completion of the contract, and that *Badeley* should hold the same subject to the agreements existing between *Smith* and the company in relation thereto, and with the benefit of such agreements. And *Smith* further covenanted with *Badeley* to pay to him one equal tenth part of the profits made by *Smith* by the performance of or under the contract, such net profits to be ascertained by him one calendar month from the date of the final certificate under the contract, and such equal tenth part to be paid within seven days from the day when such net profits should have been so ascertained as aforesaid; from which day such equal tenth part should be deemed an advance secured by indenture, save that no interest should be payable in respect thereof: provided that in ascertaining such net profits the annual sum of £1000 which might be drawn out by *Smith* should be treated as an allowance made to him for his services in relation to the carrying out of the contract, and should be deemed an outgoing and be deducted from the profits under the said contract before ascertaining the said net profits.

Under this agreement *Badeley* made large advances to *Smith*, who commenced and carried on the works under the contract. The railway company being in want of money to pay *Smith*, an arrangement was made under which the chairman and four of the directors gave a guarantee to the *Consolidated Bank* to cover advances to *Smith* not exceeding £16,000. Under this guarantee, £12,600 was advanced to *Smith* by the bank. A further contract was made on the 27th of November, 1880, between the railway company and *Smith*, which provided, among other things, that *Smith* would accept for cash payments *Lloyd's* bonds for the same amounts; which *Lloyd's* bonds as the same should become deliverable should be handed over to the *Consolidated Bank* until a total of £16,000 should have been handed over to the bank, and the bonds should remain in the hands of the bank until the sum of £16,000 which had been guaranteed to the bank or other the amount due on the guarantee had been repaid to the bank.

The railway company accordingly in 1881 issued bonds for £16,000, which were deposited with the bank.

In February, 1882, the Defendant *Wallis* recovered judgment against *Smith* for money due, and obtained a garnishee order attaching all debts due from the railway company to *Smith*.

Formal notice was not given to the railway company of *Smith's* mortgage to the Plaintiff until April, 1882, after the date of the garnishee order. Other creditors of *Smith* also obtained garnishee orders in 1883.

In December, 1882, *Smith* brought an action against the company for money due to him under the contract. This action was compromised by an order of the 13th of July, 1883, on the terms that the balance due to *Smith* should be agreed to as £38,000, and that *Smith* should receive £38,000 debenture stock in payment of that amount, and that the *Lloyd's* bonds should be given up to the company to be cancelled.

In this action *G. H. Terrell*, *Smith's* solicitor, obtained a charging order on the debenture stock for his costs, and *G. H. Terrell* sub-mortgaged this charge to *A. àBecket Terrell.*

The *Consolidated Bank* sued *Smith* for the £12,600 advanced by them to him, and the guarantors paid to the bank all that was due, but the bank still held the *Lloyd's* bonds. *Smith* had become bankrupt.

Badeley brought this action against the *Consolidated Bank*, the railway company, the surviving guarantors, and the executors of one of them, *Haworth*, who was dead, the judgment creditors, and the trustee in *Smith's* bankruptcy, claiming a declaration that the Plaintiff was entitled to a first charge upon the debentures to be issued, and for accounts and foreclosure against the several Defendants who claimed charges on the debentures. The executors of *Haworth* beside other defences pleaded that the Plaintiff was in fact a partner of *Smith*, and as such must indemnify *Haworth's* estate against all claims under the guarantee, and they counter-claimed accordingly. The surviving guarantors did not join in this defence and counter-claim.

The correspondence between the solicitors and between *Badeley* and *Smith* was relied on as proving that *Badeley* and *Smith* were in fact partners. This correspondence is specially referred to in the previous report and in the judgment of Lord Justice *Cotton*.

Mr. Justice *Stirling* held that the Plaintiff could have no priority over the guarantors without redeeming the *Lloyd's* bonds; and he also held that there was in fact a partnership between *Smith* and the Plaintiff, and that the Plaintiff must indemnify the estate of *Haworth* against all claims under the guarantee. But he held that *Wallis*, although he had no notice of the Plaintiff's mortgage, obtained no priority over him or the guarantors by his garnishee order.

From this judgment the Plaintiff and *Wallis* appealed.

Rigby, Q.C., and *Swinfen Eady* (*Eve* with them), for the Plaintiff:—

The Judge was wrong in holding that there was a partnership between the Plaintiff and *Smith*. The first transaction between the parties was an agreement in 1877 by which *Smith* mortgaged to the Plaintiff the benefit of a contract with the *Great Western Railway Company* for the purposes of which the Plaintiff advanced money to *Smith*. The work was done, and that money repaid. The transaction of 1878 was intended to be of the same character, and there is nothing in the deed of the 4th of July, 1878, which points at a partnership, or which is anything more than ancillary to a security for money lent. Mr. Justice *Stirling* relied much on the correspondence, and dealt with it in a way which makes it difficult for us to follow him. Certain letters were particularly referred to, but he stated that on the correspondence as a whole, which is very voluminous, he had come to a conclusion to which he might not have been brought by the particular letters taken alone. We contend that on the correspondence there was no idea of partnership. Both parties indeed speak of "capital," but it is a colourless word, and only refers to the money that *Smith* wanted for his operations; it is never used in the correspondence in the sense of money which several persons invest in a business. The correspondence divides itself into parts. In the first part both parties clearly treat the advances as loans. *Smith* is pressing for further advances, *Badeley* is telling him to go elsewhere for them. A suggestion was at one time made by the solicitors that there should be a sleeping partnership, but it was rejected—the parties intended no relation but that of mortgagor and mortgagee.

With respect to the terms of the deed, it is now established that although the right to participate in the profits of trade is a strong test of partnership, the question whether that relation does or does not exist depends upon the real intention and contract between the parties: *Mollwo, March & Co.* v. *The Court of Wards* (1), where the clauses for the maintenance of the security were wider than they are here. Here, the agreement was essentially a lender's agreement, and it might have been put an end to at any moment by payment of the money. In *Pooley* v. *Driver* (2) the provisions of the agreement were contrived to give the contributors the whole advantages of a partnership in the business. In *Ex parte Delhasse* (3) there was a loan to the business, and a bargain to share profit and loss. But it is quite competent for a lender to advance money to a trader for the purpose of a particular adventure, to be repaid when that particular business is completed; and this is not the case of a loan to a business to last as long as the business exists, which would, no doubt, have afforded a strong indication that the lender intended to have the rights of a partner. The clause as to drawings out was relied on, but that element existed in the strongest form in *Mollwo, March, & Co.* v. *The Court of Wards.*

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(1) Law Rep. 4 P. C. 419.

(2) 5 Ch. D. 458.

(3) 7 Ch. D. 511.

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This is not a case of *aliud simulatum aliud actum*, and the Appellant is a creditor and not a partner.

Cozens-Hardy, Q.C., and *Chadwyck Healey*, for *Haworth's* executors :—

The question is whether the money was lent to the trader to be employed in a particular manner, or to the business, leaving it to the trader to employ it as he liked, and we contend that the latter was the case here. *Badeley* was, in fact, finding the capital for the business, and his letters shew that he considered he was advancing and bound to advance as a partner, and knew that he was a partner. He was one of the principals for whom the business was carried on. The case is concluded by *Pooley* v. *Driver* (1) and *Ex parte Delhasse* (2), which lay down that the mere perception of profits as profits unless there is something to explain it away makes a man a partner.

[COTTON, L.J. :—Is that so? It must depend upon the character in which the profits are received.

BOWEN, L.J. :—The right to take profits comes from contract, so does the partnership, if any. How can one clause in a written contract be *primâ facie* evidence of the whole contract?]

The special terms of the agreement all tend to shew that there was intended to be a partnership between the Plaintiff and *Smith*. There was a covenant to pay a direct share of the profits, not only interest proportioned to the profits. We also rely upon the stipulations that *Smith* should not sell the debentures and shares within twelve months after the completion of the contract, and that *Smith* should be allowed to "draw out" £1000 a year. The whole tone of the correspondence is to the same effect, as pointed out by Mr. Justice *Stirling*.

Tanner, for *A. àBecket Terrell*, contended, that in default of the Plaintiff redeeming, the action ought to be dismissed against all the Defendants. He referred to *Hallett* v. *Furze* (3).

(1) 5 Ch. D. 458.
(2) 7 Ch. D. 511.
(3) 31 Ch. D. 312.

The Defendant *Wallis*, in person:—

I also contend that there was a partnership between the Plaintiff and *Smith;* and further, that if there was no partnership the Plaintiff is precluded from recovering any principal or interest by sect. 5 of *Bovill's Act* (28 & 29 Vict. c. 86) until all *Smith's* creditors are satisfied. I submit also, that Mr. Justice *Stirling* was wrong in holding that the guarantors had any security on the *Lloyd's* bonds. Those bonds were held by the bank for *Smith.* They were deposited in the bank to prevent *Smith* from dealing with them. The loan was really made to the railway company not to *Smith.* The guarantors are not entitled to any security on the *Lloyd's* bonds, because they have not paid off the debt in full. My claim is prior to the Plaintiff's mortgage which was only an equitable security, and he gave no notice of it to the railway company till after my charge was completed. A garnishee has the same rights as a mortgagee. If the Plaintiff ever had any priority he has lost it by his conduct. He has been throughout colluding with *Smith* to defeat *Smith's* creditors.

Sir *Horace Davey*, Q.C., *Barber*, Q.C., and *S. Hall*, for the surviving guarantors.

W. P. Beale, for the Railway Company.

S. Hall, for the *Consolidated Bank.*

Rigby, in reply.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Stirling* in which there is one important point, namely, the question which arises between the Plaintiff and the executors of the Defendant *Haworth*, who contended, by their counter-claim, that there was a partnership as between the Plaintiff and *J. M. Smith.* On that ground judgment was given by Mr. Justice *Stirling* in favour of the executors, who laid down that the Plaintiff was bound to indemnify the executors against any liability which they might have incurred in consequence of their being guarantors in respect of a sum of £16,000 which was to be borrowed from the *Consoli-*

dated Bank. That undoubtedly is an important question, but with all respect to the opinion of Mr. Justice *Stirling* I cannot agree with the view which he took, and I think it may be decided, with reference to the principle on which such cases ought to be decided, very shortly. The case before the Privy Council —*Mollwo, March & Co.* v. *The Court of Wards* (1)—and the case which was before the Court of Appeal, where I gave one of the judgments of the Court—*Ex parte Tennant* (2)—laid down what is the true law on this subject, and I understand that there has been no decision since those cases which has really laid down a different principle.

Mr. *Smith* was a contractor, and before the year 1878 there had been a transaction between him and the Plaintiff, the Plaintiff being a man possessed of money and being willing, on terms, to advance money to Mr. *Smith* to enable him to carry out contracts which he might enter into, or had entered into, for the construction of railways. The first transaction was one in 1877, and that we may pass over very lightly, because it is not the matter on which we have to decide. It was said that even then there were stipulations in the contract which shewed that it was not a contract of loan, but that it was a contract of partnership; but I think if we cannot out of the mortgage of 1878 make out that there was enough to make *Smith* and *Badeley*, partners, it would be useless to go back to that earlier transaction of 1877. The only way in which it can be used is this—that this is not an isolated transaction, and that you find a similar transaction in the year 1877. If, as in my opinion is the case, the transaction of 1878 did not make the Plaintiff and *Smith* partners, there is nothing in the transaction of 1877 which could make them so, and thereby aid the contention of the counter-claimants. Certain sums of money, I think £1500 at first, and afterwards other sums, were lent by *Badeley* to *Smith* for the purpose of enabling him to execute a contract with the railway company, and it is quite obvious why that was necessary, because the contractor, from time to time, on the certificate of the engineers, gets sums from the railway company, if it has money to pay, which enable him to go on with the prosecution of the contract into which he has entered; but till those certificates can be obtained and made available, he wants capital in order to enable him to perform the works which he has undertaken. Then there was a contract of the 4th of July, 1878, entered into between the Plaintiff and *Smith*, and there are various letters which passed from time to time between them; and the question for us to decide is whether *Badeley* and *Smith* were partners or not.

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(1) Law Rep. 4 P. C. 419.

(2) 6 Ch. D. 303.

Before I go more fully into the circumstances which arise here, let me inquire what is the law with regard to the principle of such cases. It must be taken now, on the authority of Lord *Blackburn*, that the rule supposed to be laid down that mere participation in profits made a man a partner is very greatly qualified if not entirely displaced. Undoubtedly *Waugh* v. *Carver* (1) is supposed to lay down that rule, but that cannot now be considered the law. What we have to consider is whether the business in respect of which the question arises is or is not the business of the two persons alleged to be partners; whether it is ostensibly carried on by one only, he acting as agent for the other party alone, in which case, of course, the other party would be liable for any debts incurred by his agent within the scope of his authority; or whether he and the person put forward and acting alone are in this position, that they have both of them such an interest in the business that one can be considered agent of the other and also principal. Of course, then, it is the joint business of the two, and if that is so, if it is carried on as the business of the two, though one alone is acting as ostensible owner of the whole thing, then they are in the position of partners; that is to say, the one who keeps in the background and does not act, is liable on the footing of his having entered into arrangements with the other, which constitute him a person bound by the contracts of the other, a person answerable as principal for the contracts of the other. It may be that although there is a partnership there may be an express stipulation that the non-acting partner is not to act as agent for the other. That is what, I suppose, one would call a sleeping partnership. But that is a stipulation putting a fetter on the rights which the person keeping in the background would otherwise have

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(1) 2 H. Bl. 235.

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if it were not for that stipulation. Now as regards the rule which has been laid down, I think one may find it in the case before the Privy Council to which I have referred. That was the case which was quoted by Sir *George Jessel* in *Pooley* v. *Driver* (1), and I will refer to a passage which is there quoted by him, because he states, I think, what is the pith of the judgment. What he says is this, quoting from the judgment of Sir *Montague Smith* in *Mollwo, March & Co.* v. *The Court of Wards* (2): "'If cases should occur where any persons, under the guise of such an arrangement,' that is, the guise of an arrangement as creditor and debtor, 'are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements and fasten responsibility on the parties according to their true and real character.'"

Then there is the case of *Ex parte Tennant* (3), where the Court had to consider the question with reference to the position of a father and son, the father having advanced money to his son to enable him to go into *Lloyd's*, and made a contract under which he was to bear the losses at *Lloyd's*, and also to take a share of the profits obtained by his son. Of course that is a different case as regards circumstances from the present, but the principle is the same. What I said there was this (4): "Now, as to participation in profits, there is, no doubt, a clause in the agreement which, for the purpose of my judgment, I will assume to amount to a participation in profits. In one sense it is so. *Waugh* v. *Carver* (5) might possibly have been relied upon as an authority for saying that the father was a partner, but it is impossible to say that the rule laid down in that case is now unqualified law. Lord *Blackburn* in *Bullen* v. *Sharp* (6) clearly refers to it as qualified. And I take it the law is this, that participation in profits is not now conclusive evidence of the existence of a partnership, but it is one of the circumstances, and a very strong one, which are to be taken into consideration for the purpose of

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(1) 5 Ch. D. 458, 474.

(2) Law Rep. 4 P. C. 438.

(3) 6 Ch. D. 303.

(4) 6 Ch. D. 315.

(5) 2 H. Bl. 235.

(6) Law Rep. 1 C. P. 112.

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seeing whether or not a partnership exists, that is to say, whether there was a joint business, or, putting it in another way, whether the parties were carrying on the business as principals and as agents for each other—whether it is a joint business or the business of one only. Now let us see what is said by Lord *Blackburn*," in the case of *Bullen* v. *Sharp* (1). "'I think that the *ratio decidendi* (of *Cox* v. *Hickman* (2)) is that the proposition laid down in *Waugh* v. *Carver* (3), viz., that the participation in the profits of a business, does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of *England*' (it has not been overruled, but it is qualified certainly), 'but that the true question is, as stated by Lord *Cranworth*, whether the trade is carried on on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining that question, but not being in itself decisive; the test being, in the language of Lord *Wensleydale*, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.'" Then I referred to what the Master of the Rolls said in *Pooley* v. *Driver*, in these words: "Certainly the Master of the Rolls does not in any way dissent from the proposition of law so laid down, because he quotes with approval the authority of Mr. Justice *Lindley*, stating the rule in substantially the same way. The Master of the Rolls in *Pooley* v. *Driver* (4), says, 'I may cite further from page 45 of the 3rd edition of Mr. *Lindley's* book, considering that learned gentleman is now a Judge, the conclusion that he comes to as to the effect of the case of *Cox* v. *Hickman*—that *primâ facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced if it appears from the whole agreement that no partnership or agency was really intended.' So that the Master of the Rolls, Lord Justice *Lindley* and Lord *Blackburn*, all agree that what you must look at is whether the relation of principal and agent existed, a participation in profits not

(1) Law Rep. 1 C. P. 112.
(2) 8 H. L. C. 268.
(3) 2 H. Bl. 235.
(4) 5 Ch. D. 481.

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necessarily constituting a partnership, but being a matter which is to be considered, and which may be conclusive if there is nothing else to prevent there being a partnership." That is what I quote from my judgment there, and to that I adhere.

But it is said that there are *dicta* of various Judges in various cases that the participation in the profits may decide the question, or that it is *primâ facie* evidence of partnership. Undoubtedly, if one found that two persons were participating in the profits made by a business, and knew nothing more, one would say, How is this? If they participate in the profits as being jointly entitled to the profits, that unless explained would lead to the conclusion that the business is the joint business of the two, and this would be partnership. But then when the participation in profits arises from a clause in an agreement entered into between the parties, it is wrong to say that this is *primâ facie* evidence of a partnership, because you must look not only to that stipulation, but to all the other stipulations in the contract, and determine whether on the stipulations of the contract taken as a whole you can come to the conclusion that there is a partnership—that there is a joint business carried on on behalf of the two—or whether the transaction is one of loan between debtor and creditor, a loan secured by giving a certain interest in the profits.

Having said this as to the law one may come now to consider what the facts of the present case are. Naturally this mortgage was a somewhat peculiar one. It was to enable Mr. *Smith* to carry out a contract with the railway company, and the real security to *Badeley* was to be whatever *Smith* got from the railway company, and it was necessary in order to make that security valuable, in order to keep it alive, that the contract should be carried on effectually. Therefore there is that which undoubtedly is not very usual as regards ordinary contracts of loan and ordinary contracts of security, namely, that the money should be applied exclusively for the purpose of the contract. That was relied upon. It was said that makes it a loan to the business. But that is quite wrong. It is merely a provision introduced in the security to enable the security to become valuable and to prevent it becoming valueless. That is one of the points which

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was urged upon us by Mr. *Cozens-Hardy.* If there had been a stipulation such as there was in the case of *Ex parte Delhasse* (1), that it should be dependent on the business whether the lender got his money back again, that he should bear proportionate loss and not get back his money if there was a loss on the contract, that would have been an additional and strong circumstance; and it was probably what led to the conclusion in *Ex parte Delhasse.* That is not so here. There is a personal liability on the part of *Smith* to pay back any money advanced by the Plaintiff. It is very true that probably the Plaintiff did not expect to get the money out of *Smith,* but expected to get paid out of the proceeds of the contract, but that was only the security for the debt which he had as against *Smith* personally. Then it was said that it was a suspicious circumstance leading to the supposition of partnership that there was power for the Plaintiff to take possession of the plant and complete the contract by himself or by others. That was really in order to make the security effectual. If *Smith* had not gone on properly to perform the contract the railway company might have objected, and then it was necessary to enable *Badeley,* the lender, to take possession and himself to complete the contract and thus make his security effectual.

Then it was urged that there was an obligation on the Plaintiff not to sell under his power any of the bonds which *Smith* was to receive from the company till a certain time after the completion of the contract. That is easily explainable without supposing that there was anything behind; because, of course, the object of *Smith* was to see that his security should be made valuable to him after the debt due to the Plaintiff had been satisfied, and that these bonds should not be thrown on the market and realized till their value had been increased by the contract being completed and the railway completed.

It was also said that a share of the profits was to be secured and guaranteed to the Plaintiff notwithstanding that the loan was previously paid off. That, undoubtedly, is an unusual stipulation, but I do not think it is an unreasonable one or inconsistent with the transaction really being a loan by *Badeley* to *Smith,* because he said, "I am running a certain amount of risk in lending you money which you may not be able to pay, and I will have besides the £10 per cent. interest which you agree to give me, even though you pay me off the money, £10 per cent. of the profits as the remuneration to me for allowing you this money which alone enables you to earn any of these profits." If it was shewn that that was a mere device in order to mask a secret partnership, it would be a very different matter; but although the Plaintiff did stipulate for that, and although the contract therefore was to be carried on for the benefit of the Plaintiff in order that he might get the £10 per cent. of the profits as well as the £10 per cent. on the money he advanced, it was not that the business was to be his, but only that in order to give him security he had power to direct and control the way in which the contract was carried on and executed by the person to whom he lent the money.

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(1) 7 Ch. D. 511.

Then there was another matter which was very much pressed upon us, namely, that there was a stipulation that in estimating the profits of the contract there should be £1000 a year allowed to and deducted by *Smith*; but that I take it amounts to this. The Plaintiff is to have a certain proportion of the profits. How are the profits to be estimated? An allowance must be made for the work and labour of *Smith*, whose business it is, and who is actively carrying it on, and although it is said he is to be at liberty to draw that sum it only means this—that the money lent is to be applied to the purpose of carrying out this contract, and that to enable *Smith* personally to give his services to it this allowance of £1000 a year is to be made to him, not as his share as the working partner, but as his allowance for his work and labour in carrying on this business which is his, and which must be deducted before they come to estimate what the profits are.

Those, I think, are the points which were urged with regard to the contract, but great reliance was placed on many letters which were read to us which passed between *Smith* and the Plaintiff. I think those go rather upon a different footing. Some of these letters do undoubtedly refer to and use the expression "working capital," but never, I think, is there any reference in those letters to "our capital," or anything which would intimate that it was the capital of the Plaintiff and *Smith*. What is the proper meaning of that? In some of those letters the word "capital," as I understand it, is used for principal moneys, in contradistinction to interest. In other cases it is used in the same sense that I used the expression, that *Smith* wanted capital to enable him to carry out his contract—as the money or means which were employed by him in order to carry out this contract; and although it is very true that the common fund of partners is called their capital, yet it does not follow that everything which is called capital of one man makes him and another to whom he writes, partners, as having a joint fund. There were two or three other letters in which such expressions as these were used—"We had better do so and so," and "Our interest." If we had not heard the remainder of the story that would be very strong, because it would have apparently treated the position of *Smith* and *Badeley* as that of persons with reference to whom the expressions "our capital" and "our work" might properly be applied. It might have been said they were partners; but, whether they were partners or not, both of them were interested in the success of this contract. It was for the interest of both of them that moneys should not be borrowed by *Smith* at ruinous interest (that was referred to in one of the letters), because that would diminish the profits in which the Plaintiff had an interest; and when you look at the position of the parties and understand how, although the business was the business of *Smith*, the Plaintiff was interested in its being carried on as profitably as possible, not on his behalf but for his benefit, then you can understand those expressions, although if you did not know what the contract was, and did not see how the thing was to be worked, you might be led to the inference that these parties must be partners. There is a great difference between saying a contract or a business is carried on so as to produce a benefit to a party, and saying it is carried on on his behalf, that is, as a contract or business in which he is one of the principals engaged. In my opinion there is nothing in those letters which ought to lead us to the conclusion that these parties entered into such an agreement as made the business carried on under that contract the joint business of the two, and made the Plaintiff a principal with *Smith* acting for him as well as for himself. Therefore, in my opinion, the counter-claim raised by the executors represented by Mr. *Cozens-Hardy* was wrong, and must be dismissed, and on that point this judgment must be reversed.

Then we come to some other matters which, although of minor importance, are so complicated that they have given rise to a great deal of contest here. We have heard Mr. *Wallis*, and he has adduced one argument founded on *Bovill's Act* (28 & 29 Vict. c. 86), which I will dispose of first. He referred to that Act, and said that, even assuming this agreement did not constitute a partnership, there was in the 5th section that which would prevent the Plaintiff from insisting upon this security. It was this: "In the event of any such trader as aforesaid being adjudged a bankrupt . . . . the lender of any such loan as aforesaid shall not be entitled to recover any portion of his principal, or of the profits or interest payable in respect of such loan." He said, "What is this action? It is an action to recover £38,000 debenture stock, and he is recovering something." It has been decided in *Ex parte Sheil* (1) that that section does not deprive a lender of the benefit of any mortgage he has got. Mr. *Wallis* says the Plaintiff is here seeking to recover within the meaning of the section. In my opinion he is not seeking to recover any principal or interest. These words must mean, recover as against the property of the debtor not comprised in the security. If there is a security then insisting upon that security is not recovering principal and interest from the debtor. It may enable him ultimately to get it; but insisting upon the security and realizing the security, or, in my opinion, taking any proceedings which are necessary in order to recover that which is comprised in the security, cannot be said to be recovering principal or interest within the meaning of that section. In my opinion, that section only means that the lender shall not come in and rank with other creditors in the bankruptcy independently of any security he has in respect of the principal, interest or profits. He is not in any way prevented from insisting upon his security, and is certainly not prevented from bringing any action against a person other than the mortgagor, such as this railway company, in order to recover property which is really included in his security. In my opinion that objection fails.

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(1) 4 Ch. D. 789.

Then we had an objection which I will now deal with. It was said that Mr. Justice *Stirling* had held this deed to be a mere device to hide a masked partnership, and that amounts to fraud; but that is altogether gone, because we have decided that it was not such a device, and Mr. Justice *Stirling* never said that the deed was fraudulent, except by saying that it was a device. I do not at all say that, even if it had been so, Mr. *Wallis's* argument would have been of any avail, but as we have decided that it was not a masked partnership, in my opinion that argument entirely fails.

Then Mr. *Wallis* says two things. He says that the guarantors here have no right at all as against these £16,000 bonds, and then he says that the Plaintiff has no right. I doubted for some time as to how far Mr. Justice *Stirling* had been right in laying down not only as between the Plaintiff and the guarantors and the *Consolidated Bank* that the guarantors had a security on these *Lloyd's* bonds, but laying down generally that they had a charge. I think Mr. *Rigby* was right in saying that in order to enable the decree to be worked out it was necessary to decide whether or no the guarantors were persons whom the Plaintiff could redeem and throw upon the other Defendants what he paid in order to redeem those bonds.

[His Lordship then considered the question whether *Wallis* had had a fair opportunity of tendering evidence and arguing his case before Mr. Justice *Stirling* and the Court of Appeal, and expressed his opinion that he had. His Lordship then proceeded:—] Then on the evidence how does Mr. *Wallis's* case stand? His contention was that these bonds were simply put into the hands of the bank for the purpose of safe custody, and that the loan was a loan not to *Smith*, but a loan to the company. That seems to me to be a mistake altogether. It is very true that the railway company were not able to pay *Smith*. Then they gave him these *Lloyd's* bonds which he was willing to take and took. They were deposited, as I understand, with the bank, partly to prevent Mr. *Smith* from going about in the market and hawking about these bonds, which the railway company did not like, and also because it was contemplated and intended that the directors of the railway company should give a guarantee to the bank for the money which was to be advanced. To whom was it advanced? It was advanced by an account being opened in favour of Mr. *Smith*. Mr. *Smith* drew against that and he employed it for the purpose of his business. "But," says Mr. *Wallis*, "that must have been really a loan to the company, because I will shew that the company had the money." That is the fallacy. It is very true that the money was employed by *Smith* in constructing a railway which became the property of the company, but it was lent to the person who was going so to employ it. The bank, if they were so minded, could not in respect of that loan make a claim against the railway company. They had *Lloyd's* bonds, which were to be security to the guarantors, but their claim against the railway company would be in respect of those *Lloyd's* bonds which were to be a security to the guarantors, not in respect of that loan of £16,000, although the way in which it was employed and the very purpose for which it was lent was to be employing the money for the work of the railway company.

Then we come to Mr. *Wallis's* case as against the Plaintiff. There he raised a great many points in his argument. He did not contend, as I understand, nor could he, in my opinion, successfully contend, that by virtue of the garnishee order he could get any right to anything except that which was due to his debtor. He could not intercept anything which he could not then receive unless the conduct of the Plaintiff had enabled him so to do, or require us to hold that by his conduct the Plaintiff had lost the right which he would otherwise have to say that this money was properly assigned to him.

[His Lordship then referred to the evidence on this point, and said that there was nothing in the conduct of the Plaintiff which would deprive the Plaintiff of his rights as against *Wallis*. His Lordship then proceeded:—] But it was said that the Plaintiff had allowed *Smith* to deal with that which was comprised in the security in such a way as to enable greater benefit to be obtained by the garnishee orders than otherwise would have been obtained. He had not given notice to the railway company. He had left the bonds and other property in the hands of *Smith*. Well, we have not heard Mr. *Rigby* upon that point, but assuming that he had, then in my opinion that will not enable *Wallis* by means of a garnishee order to get a greater right as against this property than he would otherwise be entitled to. In my opinion, his rights under the garnishee order were only to attach that which could properly and without violation of the rights of other persons be dealt with by *Smith*. *Smith* had already assigned all his claims against the railway company to the Plaintiff. That was a security otherwise unimpeachable, and, in my opinion, Mr. *Wallis* under his garnishee order cannot establish any claim in derogation of the rights which the Plaintiff had under his security. Therefore the appeal of Mr. *Wallis* entirely fails, and must be dismissed with costs.

But I think that the order ought to be a little varied in this respect. If the Plaintiff does not redeem the *Lloyd's* bonds which are in the hands of the guarantors, or which will be in the hands of the guarantors, the action is dismissed altogether as against certain Defendants. I think it right that the action should be dismissed as against the guarantors if the Plaintiff does not redeem, but then as regards the other Defendants they are parties appearing to be interested in the equity of redemption of the property comprised in the Plaintiff's security, and although there may be a dismissal as against the guarantors, yet, in my opinion, the action should not be dismissed as against all those other parties, except so far as it seeks to redeem these £16,000 *Lloyd's* bonds. Then as regards Mr. *Terrell*, who had a right under a charging order, it is rather doubtful whether that declaration should have been made as regards property which at present does not exist, but I think there is no harm in that, and if the Plaintiff does not choose to redeem *Terrell*, then the action should be dismissed as against him so far as it seeks relief against the charge obtained by Mr. *Terrell* under the order of the 13th of July.

Then we come to the question of the costs of the appeal, and the Plaintiff, the Appellant, must pay the costs of the guarantors appearing by Sir *Horace Davey*. Then as regards the executors of *Haworth*, they have failed, and must pay the costs of the appeal as well as the costs of the counter-claim, except so far as the costs of the appeal have been occasioned by all the notices of appeal except that which questions the decision of Mr. Justice *Stirling* as regards the partnership, and the consequential directions.

LINDLEY, L.J.:—

I am of the same opinion, and I shall confine my observations within a very small compass. The important questions which have arisen here are two. First of all there is this question of partnership which has been decided against the Plaintiff by Mr. Justice *Stirling*; and, secondly, the right of the Plaintiff, if any, to enforce his securities by way of foreclosure, having regard to the 5th section of what is called *Bovill's Act*. The other points are easy, and upon them I propose to say nothing.

But upon this partnership point, which is the only question on which we differ from Mr. Justice *Stirling*, I think it is only right, considering the great pains he took in the case, that I should state shortly the grounds on which I am unable to agree with him. Mr. Justice *Stirling* in his judgment held this partnership to exist, not by reason, as I understand, of the formal deed, but rather by reason of the correspondence and other documents outside the deed, and partly perhaps the conduct of the parties. Now the first point we have to consider is, what is the point upon which we have to make up our mind. What are we to get at? I take it that it is quite plain now, ever since *Cox* v. *Hickman* (1), that what we have to get at is the real agreement between the parties. It is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another. It may be, and probably it is true, that if all that is known is that one person carries on a business and shares the profits of that business with another, *primâ facie* those two are partners, or *primâ facie* the person carrying on the business is carrying it on as the agent of the person with whom he shares his profits. That may be true, and I think is true even now; but when you have a great deal more to consider it appears to me to be a fallacy to say that you are to proceed upon the idea that sharing profits *primâ facie* creates a partnership or an agency, and that *primâ facie* presumption has to be rebutted by something else. I cannot help thinking that Sir *Montague Smith* was quite correct when he dealt with that mode of reasoning in the case of *Mollwo, March, & Co.* v. *The Court of Wards* (1). He says this: "It was contended at the Bar, that whatever may have been the intention, a participation in the net profits of the business was, in contemplation of law, such cogent evidence of partnership that a presumption arose sufficient to establish, as regards third parties, that relation, unless rebutted by other circumstances. It appears to their Lordships that the rule of construction involved in this contention is too artificial; for it takes one term only of the contract and at once raises a presumption upon it. Whereas the whole scope of the agreement, and all its terms, ought to be looked at before any presumption of intention can properly be made at all." Now it appears to me, having read the judgment of Mr. Justice *Stirling* with great attention, that he has inadvertently fallen into that erroneous method of reasoning. He has laid stress on the fact that *Smith* and *Badeley* participated in profits and has treated that circumstance as *primâ facie* evidence of partnership which had to be rebutted by other evidence, instead of taking the whole of the documents and the whole of the evidence and drawing such inferences as he thought right from the whole.

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(1) 8 H. L. C. 268.

Then certain letters were alluded to in which the expression "capital" was used, and there is a rather remarkable document, a receipt, on which Mr. *Cozens-Hardy* naturally relied, on the 26th of September, 1878, which was a receipt for £1000 advanced on account of working capital. I quite agree that if you take those documents alone they are consistent with either view. But they do not stand alone by any means, and when you do look at the whole of the evidence it appears to me that the formal document expresses the real truth, namely, that this was a contract of loan upon security. It was said that the capital was in the business, and risked in the business. It was in the business in a sense, that is to say, the money was advanced for the purpose of enabling *Smith* to carry on his contract with the railway company, and there was a stipulation that the money should be used for

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(1) Law Rep. 4 P. C. 433.

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that purpose. But there was not in this case what there was in *Pooley* v. *Driver* (1) and *Ex parte Delhasse* (2), a participation in loss on the part of the lender. The capital was not risked in the business in any such sense as it was in those two cases. If *Smith* had acquired funds in any other way *Badeley* could have recovered his money, the principal, interest and profits. There was a loan legally constituted and intended to be created, and the money which was advanced by *Badeley* to *Smith* was not made contingent as to its repayment upon the success of the undertaking. It appears to me that when you look at the transaction with a view to ascertain the real, true nature of it you are driven to the conclusion that it was a *bonâ fide* loan upon security, and not a participation in profits with a view to create a partnership either secret or open.

Now, I quite agree with Mr. *Cozens-Hardy* up to a certain point, that is to say, that this security for the loan contains so many clauses that it would be difficult, if not impossible, to protect it under the 1st section of *Bovill's Act*. The 1st section of *Bovill's Act* merely says that a loan on the terms of sharing profits shall not itself constitute a partnership. There is in this deed a great deal more than that, but it is not sufficient to say that the contract is not protected by *Bovill's Act*. You must fall back upon what the law is, independently of *Bovill's Act*, and fall back upon the law as settled by the House of Lords in the well-known case of *Cox* v. *Hickman* (3), and try the case by the test which the House of Lords said must be applied in that case. The conclusion, I repeat, appears, to me to be inevitable, with great respect to Mr. Justice *Stirling*, that you cannot infer an agency or a partnership from these deeds, or the letters, or the contract, or all combined, but that you are driven to the conclusion that this was what it purports to be, namely, an honest loan on security, and nothing more and nothing less.

Another point to which I will allude is the point raised by Mr. *Wallis*—that even if that were so *Badeley* could not foreclose his securities upon the ground that he was thereby endeavouring to recover a portion of his principal or the profits or

(1) 5 Ch. D. 458.

(2) 7 Ch. D. 511.

(3) 8 H. L. C. 268.

interest payable on such a loan, and he could not do that in competition with *Smith's* other creditors. Now there is obviously a fallacy at the bottom of that argument. Supposing that a person lends money upon mortgage of real estate, and stipulates that he is to have a share in the profits of some business, is it to be supposed that that mortgagee could not bring an ejectment to recover his security because of this 5th section of *Bovill's Act*? It is too absurd. That is not recovering his principal and interest. It is very true that unless he gets his security he may lose the fund out of which it is to be repaid; but such a case as that is not within the section at all. Neither is a case of foreclosure within the section. Foreclosure is realising the security. What the mortgagee says in the foreclosure is, "Redeem me or leave me alone." It is quite true that the case of *Ex parte Sheil* (1) does not go quite the length of this case. In *Ex parte Sheil* the lender was acting on the defensive. The trustee in bankruptcy wanted to make him give up his security. *Sheil* was not bound to do it. Here the lender is trying to enforce his security by foreclosure. It appears to me that he is not prevented so doing by the 5th section of *Bovill's Act*, nor by any principle of ordinary law.

Having made those observations, I content myself with saying I agree on all the other points which have been raised in this case with Lord Justice *Cotton*.

BOWEN, L.J.:—

I should say nothing at all but for the fact that on one point we differ from Mr. Justice *Stirling*, and on that point I shall have very few observations to make. Having regard to that, I think the law of partnership has been as well stated as it could be by Lord Justice *Cotton* and Lord Justice *Lindley*. It is not new law which has been stated. To my mind, the true test of partnership has been settled by the House of Lords and by Court after Court, in a way which leaves it no longer open to discussion. The real test is that which is decided by a catena of cases beginning with *Cox* v. *Hickman* (2) and ending, I hope, with this case, though I am not sure of that. The question is whether

(1) 4 Ch. D. 789.

(2) 8 H. L. C. 268.

there is a joint business or whether the parties are carrying on business as principals and agents for each other. Now where has Mr. Justice *Stirling* gone wrong? He has gone wrong because he has not followed that test. What he has done is this. He has taken one of the circumstances which in many cases affords an ample guide to the truth; he has treated that circumstance as if, taken alone, it shifted the onus of proof—as if it raised a presumption of partnership—and then he has looked about over the rest of the contract to see if he could find anything which rebutted that presumption. Now that cannot be a right way of dealing with the case. You have a group of facts—A, B, C, D, E and F, and you want to know the right conclusion to draw from them. The right way is to weigh the facts separately and together, and to draw your conclusion. It is not to take A, and say that if A stood alone it would shift the onus of proof, and then to look over B, C, D, E and F and see if the remainder of the proof is sufficient to rebut the presumption supposed to be raised. The truth is, that all the cases which go beyond the line, or the test, or the definition, which has been explained once more by Lord Justice *Cotton*, are cases which depend on exploded fallacies. One fallacy after another has been exploded about the way in which to deal with these partnership cases, and no fallacy has been harder to kill than that about participation in profits. Of course, as the Lord Justice has pointed out, there may be cases in which participation in profits is enough to enable the Court to decide the matter, but if you once lay down a principle of law that participation in profits is a determining factor, at that moment you depart from the region of law into the region of fact. It seems to me, the right thing is to come back to the true test, to examine the case carefully with regard to that test, and it has been examined very carefully, and I think sufficiently, by the Lords Justices. I can only say, as to the rest, that I entirely agree.

COTTON, L.J.:—

There is one point which I intended to mention but I forgot to do so. Mr. *Wallis* argued that till the guarantors actually paid off the debt in full they could not be entitled to this security, and that therefore his garnishee order took precedence. There was security to the bank, and although the guarantors will not get the benefit of that security till they have paid off the amount due to the bank under their guarantee, their right to have it existed, and could not be defeated by the garnishee order, which could only take effect as against that which the debtor of Mr. *Wallis* could properly, and without violation of any other rights of any one else, grant to him. I think, possibly, it would be right to add this, that the guarantors are, on the payment to the *Consolidated Bank* by the guarantors of the amount secured by their guarantee, entitled to the security.

Solicitors for Plaintiff: *Nash, Field & Withers.*

Solicitors for Defendants: *Shaw & Tremellen,* agents for *P. & J. Watson, Bury; Phelps, Sidgwick & Biddle,* agents for *Sale Seddon & Co., Manchester; Rowcliffes, Rawle & Co.,* agents for *Addleshaw & Warburton, Manchester; W. P. V. Wallis; Le Brasseur & Oakley; Trinders & Romer; Batten, Proffitt & Scott,* agents for *W. Harper, Bury; Terrell & Co.*

M. W.

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Pleading—Striking out Pleadings as unnecessary or embarrassing—Rules of Supreme Court, 1883, *Order* XIX., *r.* 27*—Exercise of Discretion.*

In an action to enforce the compromise of a former action brought in assertion of rights of water, as to which disputes had arisen, Plaintiff will not be allowed, by setting out in his statement of claim the allegations as to his right and the corresponding liabilities of the Defendant which were contained in his former statement of claim, to relitigate the questions raised in the former action, and intended to have been finally disposed of by the compromise.

Such allegations were accordingly ordered to be struck out under Order XIX., r. 27, as embarrassing and unnecessary, though a motion for that purpose had been refused by the Court below.

APPEAL from the dismissal by the Vice-Chancellor of the *Lancaster* Chancery Court of an application by the Defendant under Order XIX., r. 27, to strike out certain paragraphs (3—12) contained in Plaintiff's statement of claim, as unnecessary and embarrassing.

The action was commenced on the 29th of August, 1887, in the *Lancaster* Chancery Court for specific performance of terms of an agreement of the 22nd of April, 1885, for the compromise of a former action commenced in the High Court, in May, 1883, by Plaintiff against the Defendant to this action in respect of certain water rights, and claiming a declaration that according to the true construction and intent of the terms of agreement, Defendant was not entitled to do certain acts.

Plaintiff was the owner and occupier of the *Tottington Mill Print Works,* on the left bank of a stream, called the *Whalves Brook,* near *Bury,* in the county of *Lancaster,* and Defendant was the occupier, as tenant to his father, of the *Stormer Hill Bleach Works,* on the right bank of the *Whalves Brook.*

In the former action, the Plaintiff alleged, by his statement of claim, that he was entitled to a clough or weir in the *Whalves Brook,* with certain specified rights arising out of his alleged title and corresponding liabilities on the part of the Defendant. The Defendant, on the other hand, by his statement of defence in the former action, denied the Plaintiff's alleged rights and the corresponding liabilities, and also asserted rights on his part which were inconsistent with those claimed by the Plaintiff.

At the trial of the former action at the Assizes, on the 22nd of April, 1885, the action was settled upon terms which defined how in future certain rights over the *Whalves Brook* were to be exercised by Plaintiff and Defendant.

On the 29th of August, 1887, the present action was commenced, and the statement of claim, delivered on the 22nd of November, 1887, set out (in paragraphs 3—12, inclusive) *verbatim,* or nearly so, a great number of the allegations which had been made by the Plaintiff and denied and put in issue by the Defendant in the former action.

In these circumstances, Defendant had taken out a summons under Order XIX., r. 27, asking that paragraphs 3—12 inclusive, of Plaintiff's statement of claim in this action might be struck out as irrelevant and unnecessary, and as tending to embarrass the Defendant in his defence to the action.

Maberly, for the Defendant, in support of the summons in the Court below.

J. M. Astbury, contrà.

Vice-Chancellor *Bristowe*, being of opinion that the allegations sought to be struck out could not be said to be absolutely unnecessary, or embarrassing, in the sense of the Defendant not knowing what case he had to meet, and that they did not tend to prejudice or delay the fair trial of the action, refused the application (1).

(1) In the course of his judgment, Vice-Chancellor *Bristowe*, after stating that he left out of consideration the question whether this pleading was scandalous, for scandalous it was not, said: Is it unnecessary and embarrassing, and does it tend to prejudice and to delay the fair trial of the action? It is alleged that this pleading (pars. 3—12, inclusive) is unnecessary, and that if not unnecessary it is, at all events, embarrassing. Whether it is unnecessary or not must depend, in my judgment, upon what the Plaintiff desires to bring before the Court. He desires to bring before the Court an agreement, and says that that agreement has such a meaning, and that he shall ask the Court to make a declaration that, according to the true construction of the agreement, he is entitled to say so and so. For that purpose, whether rightly or wrongly I do not now decide, he says it is essential that the Court should know what, at the date when that agreement was entered into, the parties meant by the agreement. The agreement, no doubt, speaks for itself, but we must understand the position of the parties at the date of the agreement and when it was entered into. Whether that argument will or will not ultimately prevail, it is not for me now to say, but it is sufficient for me to say that in my view of the matter, the Plaintiff, running all the risk of all future costs if he does that which is wrong, is entitled to say: "I wish to place before the Court that statement of facts which existed at the date when the agreement was entered into. I say that the agreement was for so and so, and that Defendant is acting as if he treated the agreement as meaning something else. And in order that the Court may come to some understanding between the two as to what the agreement does mean, I will tell the Court first, by a recital of the agreement, that which in fact was the state of things at the time when the agreement was entered into."

Having regard to the decisions upon this matter, where the Court has held that reasonable latitude must be given, I cannot say that it is absolutely unnecessary that that statement should appear. The Plaintiff says that the Court cannot possibly understand that agreement without understanding the position in which the parties stood at the time when the agreement was entered into. It may turn out upon certain points that it will be necessary to give evidence on that particular point. I cannot therefore at this stage of the proceedings say that the statement is absolutely unnecessary. But then it is urged that, if not unnecessary, it is at all events greatly embarrassing, because the Defendant

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From this order the Defendant had appealed.

Romer, Q.C., and *Maberly*, in support of the appeal:—

The paragraphs complained of, which reiterate in substantially the same language the points in dispute in the former action, are unnecessary and embarrassing, inasmuch as the Defendant is called upon again to try the very issues which by the terms of the agreement were finally disposed of once for all.

[BOWEN, L.J.:—Does the Defendant admit that he is bound by the agreement to compromise?]

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does not know what he has got to meet in respect of these charges contained in this statement of claim. Is he to go back to the other statement of claim and the state of the litigation when this agreement was entered into, and which might lead him into a vortex which he does not see his way out of? or is he only to answer or to meet the particular passages here stated in this particular statement of claim? If I have only to meet them, says the Defendant, they will give me very great embarrassment. Pausing for a moment there, there may be something which would embarrass the Defendant in the sense of his being able to shew that the agreement is what he claims it to be. There may be embarrassment in his being able to shew that, and there may be embarrassment in the Plaintiff not being able to shew the reverse; but in no case is there that which I conceive to be embarrassment in the sense that it contains things alleged, and as it were thrown broadcast, against the Defendant which he does not know the meaning of or how to reply to. I think that here there is quite sufficient alleged for him to see what is the point raised, and that it is not embarrassing in the sense of his not knowing what it is that he has got to meet, though it may be embarrassing in his having to put in an answer or a denial upon a particular point. That I do not know anything about, but I see no difficulty in the sense of embarrassment as to what would enable him to answer the allegations. Then is there anything to prejudice or delay the fair trial of the action? I do not see anything to prejudice; and as to delaying the fair trial of the action no reason has been offered to me by which I can suppose that the fair trial of this action would be delayed beyond what would in the ordinary course of time be required to put in an answer, and so I do not think that anything in the way of delay has been urged before me that would justify me in striking out these paragraphs. Looking therefore at the point that under the circumstances these matters cannot be said to be absolutely unnecessary, and seeing that they are not misconceived, except in the sense that they might give the Defendant some trouble to answer, I see no reason to strike out these matters from the statement of claim, and I think that no other order on this application should be made than that the application should be refused, and that the costs should be costs in the action.

Certainly he does, but if it be open to the Plaintiff to go into all these matters which are behind the agreement, of what avail is the agreement, as the parties will be remitted to the position which existed before the agreement was entered into?

The whole question is, what is the true construction of the agreement, having regard to the surrounding circumstances, and whether there has been any breach by the Defendant?

It was only necessary for the Plaintiff to have stated how the brook ran, and how it was used, and then shortly the statements in dispute *pro* and *con* in the former action.

[They were stopped.]

J. M. Astbury, for the Respondent:—

Except in very extreme cases, or where a wrong principle has been adopted, the Court of Appeal will not interfere with the exercise by the Judge of First Instance of his discretion as to retaining or striking out pleadings: *Watson* v. *Rodwell* (1).

[COTTON, L.J.:—I am not satisfied that the Vice-Chancellor did not exercise his discretion upon a wrong principle.]

In order to put a construction upon the agreement the Court must understand the position of the parties, and know what was the exact state of circumstances when they entered into the agreement. An essential part of those circumstances would be the rights to which either party was entitled, either by lapse of time, grant, or by agreement, independently of the agreement of compromise.

[LINDLEY, L.J.:—Your rights under the agreement would be what the Defendant would agree to give you.]

The Plaintiff ought to be allowed to state the nature of the rights claimed by him in the former action, and that those rights were controverted, as otherwise he will have great difficulty in satisfying the Court that the construction of the agreement for which he contends is the proper construction.

COTTON, L.J.:—

Notwithstanding the very able argument on behalf of the Respondent I think that the Vice-Chancellor did not make the

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(1) 3 Ch. D. 380.

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order which he ought to have made. And although we are very unwilling to interfere with the discretion of the Judge of the Court below, where that discretion—though we think we should not have exercised it in the same way—has been exercised on right principles, and no material injury has been done to the person against whom such discretion has been exercised, yet, in my opinion, the Vice-Chancellor has not gone really on the right principles in exercising his discretion. If we did not make the order asked for, I think the Defendant would be subjected to very great prejudice, because he might have to fight over again the question as to the rights of the parties which was in contest in 1883, and was intended to be put an end to by the agreement which this action is brought to enforce. For it must be remembered that this action is only to enforce the agreement entered into on the compromise of the previous action of 1883, in which there was a contest as to the rights of the Plaintiff and of the Defendant with reference to this stream.

Now in this statement of claim the Plaintiff has made allegations, not that there were certain points raised and in dispute in that previous action, but that certain rights existed in the Plaintiff, and that certain facts, that were in contest, existed as he alleges they did; forcing of course the Defendant, if these matters are to be considered in any way material to the proper construction of the agreement which this action seeks to enforce, to go into evidence on disputed facts, and to fight over again in this action those matters which in the former action he was prepared to fight as to his own rights and the rights of the Plaintiff. That fight was compromised by the agreement which both parties agree ought to be carried into execution, which the Plaintiff seeks by this action to enforce, and which the Defendant states he is willing to perform according to its true construction.

It may possibly be a difficult task for the Judge to construe this agreement, but he must do it; and in my opinion the surrounding circumstances, which he may look at, and which will have to be considered, are, what was the position of the stream, of the works of the Plaintiff and the Defendant, of the weirs, of the inlet, where the passage from the Defendant's works into the stream was, and all the matters as to the physical position of the stream and the way in which the water was dealt with. And then it must be seen what were the allegations on both sides on which this agreement to compromise was made. We must see what the Plaintiff alleged were his rights, and how far the Defendant admitted what was claimed by the Plaintiff as his rights. If in that action the Defendant did admit that certain rights claimed by the Plaintiff were really his rights, that of course would be most material. It would also, I think, be right to consider if there was any admission made in a tangible form of a right existing in the Plaintiff, or by the Plaintiff of a right existing in the Defendant before this agreement was entered into. I do not mean that one party must have admitted that he was wrong if he denied it, but an actual admission made that certain rights exist may be looked at. In my opinion it would be wrong to allow in this pleading statements to be made which raise as facts to be decided in this action facts which were in issue in the previous action, and the dispute as to which was intended to be, and was, compromised by the agreement we have to construe.

In my opinion, therefore, those passages as to which the disputed question arises, viz.: paragraphs 3–12, ought to be struck out, as containing matters not properly to be considered with reference to deciding the rights of the parties under the agreement; and striking them out there ought to be liberty to the Plaintiff to amend. He must not, however, amend by stating the contest in the previous action with any hope of giving evidence that he was right in that contest, right as to the facts which he alleged, right in his allegation as to having certain rights which he claims. If he attempts to do so, it would be wrong in the Judge to allow that evidence to be given in order to influence his decision as to the true construction of the agreement. He must look at the physical facts existing, not at the disputed rights or disputed facts.

From what I have said the Plaintiff, I think, will know how he ought to amend.

I think a mere reference to the disputes and to the action having been brought, which was afterwards compromised, would be quite sufficient, because the Defendant could not say he did

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not know what the allegations in the previous action were. That being so, even if the case was not considered in exactly the same way below as it has been here, the costs of the appeal and of the proceedings in the Court below ought to be the Defendant's costs in any event.

LINDLEY, L.J. :—

I am of the same opinion. This case, under colour of a motion to strike out paragraphs as unnecessary or embarrassing, raises a question of very considerable importance—a question of principle. The action itself is to obtain specific performance of an agreement of compromise, and that is the whole of the action. What is legitimate in an action of that kind? Is it legitimate to contest over again the very dispute which it was the object of the parties to settle for ever by their compromise? It appears to me obviously enough that what you want to do, and the only thing you can legitimately look into in an action to enforce that compromise, is to understand the subject-matter it relates to, to understand the disputes, the alleged rights which were in dispute at the time the compromise was made. The whole object of the compromise would be defeated if either party were allowed to relitigate the question who was right and who was wrong before the compromise was entered into. It appears to me the substance of this case is an extremely important one, and the Vice-Chancellor has not borne in mind the fact that the Plaintiff has here been seeking to do that which is in principle erroneous. The order which the Lord Justice has suggested will be the proper order.

BOWEN, L.J. :—

I add an expression of my opinion out of respect to the Vice-Chancellor, as we are differing from him.

It seems to me that the rule that the Court is not to dictate to parties how they should frame their case, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law; and if a party introduces a pleading which is unnecessary, and it tends to prejudice, embarrass, and delay the trial of the action, it then becomes a pleading which is beyond his right.

We have been told this is a matter of discretion for the Judge. In one sense it is a matter of discretion, but that, be it observed, does not completely define the situation. The Judge is clothed by the rule with power which he may exercise, but the same rule that clothes him with power defines the object for which the power has to be exercised, in the definition which it gives of the subject-matter to which the power should be applied. It becomes, therefore, the duty of the Judge who has to apply the rule, to apply his power in a fit case; and a fit case will be that which fulfils the definition of the rule, and in which there are no other circumstances which make it inappropriate, and inconvenient, or unjust to apply the power. And when it is spoken of as a power of discretion, it must be remembered that in that sense only is it a power of discretion. We have been referred to a passage from the judgment of Lord Justice *James*, in *Watson* v. *Rodwell* (1), that in matters within the discretion of the Judge of first instance, the Court of Appeal would not overrule that discretion. But when it was urged before that learned Judge in the subsequent case of *Davy* v. *Garrett* (2), on the authority of *Watson* v. *Rodwell*, that where the Vice-Chancellor had exercised his discretion the Court of Appeal would not interfere with it, Lord Justice *James* made the following observations (3): "The argument was strongly pressed upon us that this was an appeal from a matter lying within the discretion of the Judge, and an observation of my own in *Watson* v. *Rodwell* was relied on. I do not know whether my expressions were stronger than was required; but it is very important that time and money should not be wasted in appeals on interlocutory matters, and I have therefore always set my face against appeals from the discretion of the Judge in matters of procedure. But a defendant may claim *ex debito justitiæ* to have the plaintiff's case presented in an intelligible form, so that he may not be embarrassed in meeting it." The power which is given to the Judge of first instance by this rule ought

(1) 3 Ch. D. 383.

(2) 7 Ch. D. 473.

(3) 7 Ch. D. 485.

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to be exercised in a fit case. Is this a fit case? Here is an agreement of compromise on which the action is brought, there having been previous disputes, and an action to enforce the Plaintiff's view of his water rights. There was a compromise, and the present action is brought to enforce the compromise. What are the surrounding circumstances by which that agreement of compromise may be considered, because it is those surrounding circumstances alone that ought to be pleaded, and they ought to be pleaded with great brevity?

Surrounding circumstances can only be divided into two groups; a group of facts or matters which were beyond controversy, out of controversy; and a second group of facts and matters which were the subject of controversy, and which were in dispute. But the Plaintiff in this case, instead of being contented with alleging the facts which at the time of the original action were out of dispute and beyond controversy, and then proceeding to allege that there was a dispute as to remaining facts, has alleged, as if they were facts, all the matters which were matters of dispute. So that although the action is based on compromise, he is putting the Defendant to proof or disproof of the same issues as those raised in the original action, to make an end of which this compromise was effected. As soon as you have ended a dispute by a compromise you have disposed of it. The Plaintiff, however, has sought to go back, to revive in his statement of claim all the original disputes, and to raise again every single matter which was the subject of dispute before. What, it seems to me, he can alone do is to place before the Court, on his pleadings at the trial, and give notice on his pleadings that he intends to place before the Court, those matters which were undisputed and unchallenged at the time of the previous action, and the fact that there was a dispute as to other matters which he may enumerate. But as to the matters which were the subject of the previous dispute he cannot endeavour to establish "aye" or "no" on any one of them, because all that dispute was closed by the compromise.

To my mind, therefore, the Vice-Chancellor was wrong in the view he took, and this pleading ought to be struck out. It ought to be amended in the way indicated and with great brevity.

Speaking for myself, but I believe my Brothers do not differ—I do not think it a proper way of pleading, to plead again in action B all the pleadings which have already been set out at length in action A. It ought to be done by reference.

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Solicitors: *W. H. Tattam*, agent for *Joseph Ellis, Manchester*; *Phelps, Sidgwick, & Biddle*, agents for *Sale Seddon & Co., Manchester.*

F. G. A. W.

SELWYN *v.* GARFIT.

[1885 S. 1169.]

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1887
KAY, J.
April 25.
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March 9.

Mortgage—Power of Sale—Proviso that Power was not to be exercised without Notice to pay and Default for three Months—Waiver of Notice—Clause protecting Purchaser against Irregularity of Sale.

A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived:—

Quære (per *Bowen*, L.J.), whether the same rule would apply where the irregularity was one which might have been waived.

Parkinson v. *Hanbury* (1) followed.

A mortgage deed contained a covenant to pay at the expiration of six months, and a power of sale in the usual form, with a proviso that the power should not be executed until the mortgagee had given notice to the mortgagor to pay off the debt and default should have been made for three months. The deed contained also the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mortgagor subsequently incumbered his equity of redemption. Two months after the date of the mortgage the mortgagee gave notice to the mortgagor to pay off the debt, and seven months after the date of the mortgage sold the property to the Defendant:—

Held, in an action by the mortgagor to set aside the sale, that three months not having elapsed since default in payment of the mortgage debt, the proviso had not been complied with, and the sale was invalid; and that as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause.

Held also, that the mortgagor having incumbered his equity of redemption, and, therefore, not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver.

BY an indenture of mortgage dated the 22nd of November, 1880, the Rev. *Congreve Selwyn* assigned his life interest in two sums of £2000 consols and £4000 secured by a promissory note, and also his reversion expectant on the lives of himself and wife in the capital of the same sums, and a policy of insurance for £700, to *Edward Green* by way of mortgage for securing the repayment of £800 and interest. The indenture contained a covenant for payment of the principal on the 22nd of May, 1881, and a power enabling *Green*, his executors, administrators, or assigns, at any time or times after the expiration of six calendar months from the date of the indenture, without further consent on the part of *Congreve Selwyn*, his executors or administrators, to sell the said dividends, annual produce, reversion and policy by public auction or private contract, with the following proviso: "Provided always, and it is hereby agreed and declared, that the said *E. Green*, his executors administrators or assigns, shall not execute the said power of sale unless and until default shall have been made in payment at the time hereinbefore appointed for payment thereof of some principal money or interest the payment whereof is intended to be thereby secured, and he or they shall have given a notice in writing to the said *Congreve Selwyn*, his executors, administrators or assigns, to pay off the moneys for the time being owing on the security of these presents, or left such notice at his or their usual or last known place of abode in *England*, and default shall have been made in payment of the whole or part of such moneys for three calendar months from the time of giving or leaving such notice."

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(1) 1 Dr. & Sm. 143; 2 D. J. & S. 450; Law Rep. 2 H. L. 1.

It was also provided that upon any sale purporting to be made in pursuance of the aforesaid power the purchaser should not be bound to inquire whether the case mentioned in the provision lastly hereinafter contained had happened, or whether any default had been made in payment of any principal or interest at the time thereinbefore appointed for payment thereof, or as to the propriety or regularity of such sale, and that notwithstanding any impropriety or irregularity whatsoever in any such sale, the same should, so far as regarded the safety and protection of the purchaser, be deemed to be within the aforesaid power, and be valid and effectual accordingly, and the remedy of the said *Congreve Selwyn* for any breach of the stipulations aforesaid should be in damages only.

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The property comprised in the mortgage was subject to certain prior charges made by *Congreve Selwyn;* and after the date of the mortgage he mortgaged the equity of redemption for further sums.

On the 19th of January, 1881, *E. Green* served *Selwyn* with a written notice that he required repayment of the principal sum of £800, interest and costs, due under the mortgage of his life estate and reversionary interest and policy of assurance.

Without further notice to *Selwyn*, *Green* sold the property comprised in the mortgage to the Defendant, Mrs. *Frances Garfit*, for £740 17*s.* 3*d.*, subject to the prior mortgages, and on the 20th of June, 1881, executed a deed conveying the property to Mrs. *Garfit.*

The Defendant *J. J. Sudbury* acted as solicitor for *E. Green* and also for Mrs. *Garfit*, who was *Sudbury's* mother, and the Plaintiff alleged that before the sale he had been assured by *Green* as well as by *Sudbury* that there was no intention to sell the mortgaged property; and that after the sale he had been informed by *Green* that he had not sold the property under the power, but only his claim thereon.

On the 14th of March, 1885, the Plaintiff brought the present action claiming that the purchase deed of the 20th of June, 1881, might be set aside as fraudulent and void, and if not, that it should stand merely as a transfer of the mortgage of the 22nd of November, 1880.

The principal ground on which the Plaintiff relied was that the power of sale was not exercisable on the 20th of June, 1881, no proper notice requiring repayment of principal and interest having been given, and the period of three months not having elapsed since the principal moneys became due, which was six months after the date of the mortgage.

The Defendants contended that the notice requiring repayment might be given, and the period of three months would begin to run, at any time after the date of the mortgage, so long as the sale did not actually take place before the expiration of six months from the date of the mortgage.

The action was heard before Mr. Justice *Kay* on the 25th of April, 1887.

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Marten, Q.C., and *Kenyon Parker*, for the Plaintiff, contended that a proper notice had not been given, and that Mrs. *Garfit* must be taken to have purchased with actual knowledge of that fact, and was therefore not protected by the clause in the proviso exempting a purchaser from inquiring as to the regularity of the sale.

They cited *Parkinson* v. *Hanbury* (1), *Jenkins* v. *Jones* (2), *Hoole* v. *Smith* (3), *Coles* v. *Trecothick* (4), and *Ex parte Bennett* (5).

Millar, Q.C., and *Simmonds*, for the Defendant, Mrs. *Garfit*, cited *Dicker* v. *Angerstein* (6).

W. B. Heath, for the Defendant *Green*.

Ince, Q.C., and *P. B. Abraham*, for the Defendant *Sudbury*.

Grosvenor Woods, for the Defendant *Southerden*, the subsequent mortgagee.

KAY, J. :—

I confess it seems impossible for me to read this power in the way in which I am asked by the Defendants to read it.

The power of sale is, in one respect, a little unusual, and differs from the ordinary form of power given in Mr. *Davidson's* well-known forms. The mortgage deed provides, first of all, in the first witnessing part, by way of covenant, that in consideration of £800 due and owing from *Congreve Selwyn* to *Edward Green*, *Congreve Selwyn* covenants that he will on the 22nd of May next — that is the 22nd of May, 1881—pay to *Edward Green* the sum of £800, with interest for the same in the meantime at the rate of £6 per cent. per annum without any deduction. That means that the mortgagor will on that day pay the principal together with the accrued interest, and although, no doubt, the money was due and owing, it was not payable under this mortgage deed until that day arrived. Then the proviso for redemption is in these terms, following the language of the covenant for payment of the principal and interest on the day named :—[His Lordship read the proviso and also the power of sale down to the words " and default shall have been made in payment of the whole or part of such moneys for three calendar months from the time of giving or leaving such notice," and continued :—]

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(1) 1 Dr. & Sm. 143; 2 D. J. & S. 450; Law Rep. 2 H. L. 1.

(2) 2 Giff. 99.

(3) 17 Ch. D. 434.

(4) 9 Ves. 234.

(5) 10 Ves. 381, 399.

(6) 3 Ch. D. 600, 603.

Now, first of all, what does that mean? Does it mean that you may give a notice the moment the mortgage has been executed, and then sell at the end of six months? Clearly that cannot be so, because if you gave a notice the moment the mortgage had been executed, there would not be any three months' default of payment at all. Does it mean that you may give a notice at any time during that six months, a notice which may expire any day after the six months? In that case, how could there be default in payment for three calendar months after the notice? There could be no default at all until the six months had expired.

Therefore, it seems to me impossible to doubt that this second condition—namely, that the mortgagee shall have given notice, which follows the condition that default shall have been made in payment and is additional to it—must mean that default must have been made in payment first. You may not sell, you shall not exercise your power until you have given notice requiring payment; that is one thing. That is, notice must have been given, not to pay at the end of three months but, to pay now; then, after the three months' interval has expired, and there has been default in payment during that three months, you may sell. It seems to me impossible, consistently with grammar and common sense, to read those words in any other manner.

Accordingly I hold that the true construction of this power and proviso, reading them together, is this—that, although there is a nominal power of sale six months after the date of the mortgage, yet the mortgagee is restrained from exercising that power until default in payment has been made, which can only happen at the end of the six months, and, in addition to that, until the mortgagee has given notice requiring payment, and default in making that payment has occurred for three months after that notice. I am not able to give any other meaning whatever to this power and proviso taken together.

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Now what occurred is plain. It is a case in which I should not be at all inclined to read the power in any other way than I have done, unless I was absolutely compelled by the grammatical construction of it to do so, for the thing mortgaged included a reversion—a reversion expectant on the lives of the mortgagor and his wife, a reversion in a sum of about £6000, of course a matter of very speculative value; and it was most important that the mortgagor and the persons claiming under him should have reasonable time before such an interest as that was put up for sale—especially as this was not a first mortgage but a fourth or a fifth mortgage—to see, after the notice requiring payment had been given, whether he could or not effect a transfer, or redeem the mortgage.

What happened actually was this, the mortgage being dated the 22nd of November, 1880, the six months would expire, as I have said, on the 22nd of May, 1881. At the date of this mortgage Mr. *Sudbury* was acting as solicitor for Mr. *Green*, the mortgagee, and he continued to act for Mr. *Green* afterwards, and prepared the mortgage on Mr. *Green's* behalf. In December, 1880, Mr. *Sudbury's* mother, Mrs. *Garfit*, instructed him, on his advice, to buy the reversion of this mortgaged property for her. Thereupon what he does is this: on the 19th of January, having received those instructions from his mother, he gives the following notice, as solicitor for *Green*, to *Selwyn* to pay off the mortgage. [His Lordship read the notice, and continued:—] It was not served, I am told, until the 19th of January, 1881. In passing I observe it is quite clear how Mr. *Green's* solicitor understood the notice, namely, that it was to be a notice for immediate payment; and, of course, at that time the mortgagee could not have required immediate payment.

Then, having given that notice which, according to the statement to me, was not served until the 19th of January, 1881, *Sudbury* went on to bargain on behalf of Mrs. *Garfit*, his mother, with *Green* for the purchase of this reversion under *Green's* power of sale, though *Green* afterwards seems not to have understood that that was the transaction. The three months from the service of that notice would expire on the 19th of April, 1881; that is before the money became payable at all. This is not even a case in which the notice was so given that the three months would expire after the date for payment of the money. Accordingly, at the expiration of the three months there was not, and had never been, any default of payment at all. The default only began on the 22nd of May, 1881, the sale was actually made by a deed dated the 20th of June, 1881; thus three months from the 22nd of May, 1881, had not expired; there were not three months' default after the notice was given, and there were not three months' default at the time of completing the sale.

Now, Mr. *Sudbury* acted in this matter throughout as solicitor for *Green*, except that just at the end, when the sale came to be completed, he advised *Green* to act by another solicitor, as *Green* did, in the actual transaction of the deed of conveyance; but Mr. *Sudbury* must be taken to have known perfectly well that the notice he gave was not a notice which could possibly produce three months' default at the time when the sale was completed. And, further, even if that were not so, Mrs. *Garfit* must be taken to have been perfectly aware of the contents and purport of the deed under which she bought, because the power of sale was the title of the person selling to her; therefore I must take her to have known that the three months' default had not occurred when the sale to her was completed.

There are very serious questions behind in this case, as I could see from the opening; but I called upon counsel to satisfy me on this preliminary point, and I am not satisfied. This seems to me to be a case in which a purchaser from a mortgagee bought with knowledge that a proper notice had not been given to enable the mortgagee to exercise the power. In saying that I follow the words of the deed, and accordingly the case which has been cited of *Parkinson* v. *Hanbury* (1), the authority of which has not been disputed, applies. In that case Vice-Chancellor *Kindersley* said (2): "By the power of sale in *Chambers*' mortgage deed it was provided that no sale should be made without three months' previous notice in writing having been given to the mortgagor, requiring payment of the mortgage money. No such notice was given, and, in fact, no notice could be given, *Parkinson* having died some three years before and there being no representative. It is true the mortgage deed contained the usual clause, that the purchaser of the mortgaged premises should not be required to ascertain that previous notice had been given, nor inquire into the necessity or expediency of such sale, and that the receipt of *Chambers* should be a sufficient discharge to the purchaser, and it is contended that this clause exonerated Messrs. *Hanbury*. I am of opinion that such a clause does not enable a purchaser, if he knows that notice has not been given, to sustain his purchase."

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(1) 1 Dr. & Sm. 143.

(2) 1 Dr. & Sm. 147.

That case went ultimately to the House of Lords, but neither in the Court of Appeal before the Lords Justices, nor in the House of Lords, was this point raised again; it was submitted to, and no authority has been cited to me—and I myself do not know of any—which in the least impugns the doctrine as laid down by Vice-Chancellor *Kindersley*. It is a doctrine which commends itself to one's common sense and reason most emphatically, because if there be a restriction upon a mortgagee's power of sale, expressed as clearly as the restriction in this case is expressed, and a purchaser buys from the mortgagee, knowing at the time that the mortgagee, by reason of not having complied with the conditions in the power, has no right to exercise the power, it would be a gross injustice to allow such a purchaser to maintain the purchase as against the mortgagor.

Accordingly, I hold in this case that the purchase cannot be maintained, because the terms of the power have not been duly followed. The consequence is this, that as between Mrs. *Garfit* and the Plaintiff, Mrs. *Garfit* must pay the costs of this action up to the trial: the sale must be set aside as a sale, and be treated as a mere transfer of *Green's* mortgage, and there will be the usual redemption decree as against the Defendants Mrs. *Garfit* and Miss *Southerden*. With respect to the Defendant *Sudbury*, he is brought before the Court upon the allegation that he himself was interested in this purchase, and that the purchase-money was his. That is abandoned at the bar, and therefore the action must be dismissed as against him with costs. As regards the Defendant *Green*, I give him no costs.

G. I. F. C.

C. A.

From this judgment the Defendant Mrs. *Garfit* appealed. The appeal was heard on the 9th of March, 1888.

Millar, Q.C., and *Simmonds*, for the Appellant:—

The notice given by the mortgagee was within the terms of the proviso, and the sale under the power was valid. The proviso is not precisely in the form given in the text-books, but it is quite intelligible and reasonable. We admit that the sale could not actually take place before the six months' limited for payment and redemption, had expired; but directly after that period, if the three months' notice had also expired, the power might be exercised. There is nothing in the proviso to limit the giving of the notice till the expiration of the six months; it might be given at any time after the execution of the deed. But if the notice was not properly given, and consequently the sale irregular, the purchaser is protected by the clause which declares that no purchaser shall be bound to inquire into the propriety or regularity of the sale. Even if the purchaser had express knowledge that no proper notice had been given, he might well suppose that the notice had been waived by the mortgagor. There is some evidence that the mortgagor had actually waived notice, and if he had not, the purchaser might reasonably suppose that he had: *Dicker* v. *Angerstein* (1). In *Parkinson* v. *Hanbury* (2), which is relied on by the other side, it was impossible for the mortgagor to waive the notice, but it was not impossible in the present case.

Marten, Q.C., and *Kenyon Parker*, for the Plaintiff, were only called on upon the question whether the sale could be supported under the clause protecting the purchaser:—

Such a clause has never been held to protect a purchaser who has notice of the irregularity of the sale. In the present case it was patent on the face of the deed that no valid notice could have been given under it before the sale. The purchaser, therefore, had distinct notice that the power could not be validly exercised. With respect to the suggestion that notice had been waived by the mortgagor, there is no evidence of this being done; nor could there be a valid waiver, because the mortgagor had assigned his interest in the equity of redemption. *Parkinson* v.

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(1) 3 Ch. D. 600, 603.

(2) 1 Dr. & Sm. 143.

Hanbury (1) is strictly in point: *Hoole* v. *Smith* (2); *Jenkins* v. *Jones* (3).

Grosvenor Woods, for the Defendant *Southerden.*

W. B. Heath, for the Defendant *Green.*

Ince, Q.C., and *P. B. Abraham*, for the Defendant *Sudbury.*

Millar, in reply.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Kay*, who in an action by a mortgagor has set aside a sale under the power of sale in the mortgage on the ground that on the construction of the power the sale did not operate to give the purchaser a good title. Was the Judge right in his construction of the power? The power was in the following terms:—[His Lordship read the power.] On the face of this power the mortgagee had power to sell after the expiration of six months, which was the period fixed by the covenant for payment and the proviso for redemption. But then there followed a proviso, in rather an unusual form, placing a restriction on the exercise of the power, and the first question is whether this proviso has been complied with. [His Lordship read the proviso.] Then this is what took place. Within six months after the date of the mortgage the mortgagee gave notice to the mortgagor to pay the mortgage debt. If the sale under this notice took place within three months after the expiration of the six months mentioned in the mortgage deed for the payment of the money, was the sale good? Mr. Justice *Kay* held that it was not good, and I think he was right. Mr. *Millar* argued that the notice could be given at any time, and that if default was made for three months the power of sale might be then exercised, provided that the six months limited for redemption had expired. But what is the meaning of default? It must mean default after payment has been demanded by a mortgagee having power to demand it. If the mortgagee gives notice before the time fixed for redemption, he has clearly no right to demand it. The proviso says that the power shall not be exercised unless notice to pay off the money shall have been given, and default shall have been made in payment for three calendar months. The money was not due before the expiration of six months from the date of mortgage: the mortgagor might have repaid it before if he pleased, but the mortgagee could not demand it. Therefore, I think there is no such notice and default as the proviso required; the default could not begin till the expiration of the six months from the date of the mortgage. As between the mortgagee and mortgagor it is quite clear that the sale was invalid. But reliance is placed on the clause for protection of the purchaser. What does that clause mean? I think that if the purchaser knew as a fact that those things which ought to be done, had not been done, she cannot be allowed to say that the sale was regular: she cannot be allowed to say that the sale was properly made in exercise of the power, if she knew that the three months which were required had not passed.

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(1) 1 Dr. & Sm. 143.

(2) 17 Ch. D. 434.

(3) 2 Giff. 99.

Then it is contended that this notice might have been waived by the mortgagor, and that the purchaser might take it that such waiver had taken place. In my opinion, there is no force in this contention. The effect of the clause was to protect the purchaser against the necessity of making inquiries, but there was nothing to entitle her to assume that a notice which she knew had not been given, had been waived. She must have known that no notice was given, because no notice could have been given within the proviso, and there is nothing in the protection clause to enable her to assume that anything had taken place to destroy the effect of that omission. In this case I can see no evidence of any waiver. It is contended that the mortgagor had waived the notice by lying by; but even if it were proved that he knew what was being done, in my opinion merely lying by would not be sufficient; you must shew some assent. And there is some evidence that the mortgagor did not in fact know what was being done, for he was informed by letters that are in evidence that the mortgagee had no intention to sell the property, but only to transfer his security. There was also this difficulty, that the mortgagor was not in a position to waive the notice, for he had assigned his interest in the property. He could not waive it as against the other persons interested.

On these grounds I am of opinion that the appeal fails and must be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. Upon the construction of the power of sale coupled with the proviso as to notice, I have little to say. It is plain that under this power there could be no sale until three months had passed after default was made in payment of the money, and there could be no default until the expiration of six months from the date of the mortgage. But it appeared to me possible that the purchaser might be able to support the sale on the ground that the mortgagor had waived the notice. I am struck with the fact that this point was not raised by the defence, but putting that aside, I am of opinion that there is no evidence of waiver by the mortgagor, and that there could have been no waiver in this case. It appears to me that the case must be decided on these grounds and that the appeal fails.

BOWEN, L.J.:—

On the principal question whether nine months must have elapsed before a sale under the power I have nothing to add. I agree with the construction of the clause which had been put upon it by the other members of the Court.

But it was suggested that the purchaser might be entitled to say that there might have been a waiver of the notice to sell after three months default. The power of sale is a general power; then there is a proviso that it should not be exercised till notice of payment and default for three months; and no such notice has been given. Might a *bonâ fide* purchaser infer that in fact there had been waiver of such notice? What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is consent to dispense with the notice. If it could be shewn that the mortgagor had power to waive the notice, and that he knew that the notice had not been served, but said nothing before the sale and nothing after it, although this would not be conclusive, there would be a case which required to

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be answered. But in this case we have the fact that *Selwyn* was not in a position to assent to any irregularity. He had parted with his equity of redemption, and could not waive the notice so as to bind the other parties interested. Therefore we can see why the Defendant has omitted to plead the waiver. We asked Mr. *Millar* whether he wished for further inquiry on the subject, but he was mute. It is clear that nothing could be made of this point of waiver.

With regard to the protection clause I have some doubt. If under the terms of a power of sale the purchaser is relieved from inquiring whether the condition in a proviso had been complied with, and if the validity of the exercise of the power of sale depends upon a proviso which the purchaser could in fact waive, I do not feel sure that the protection clause would not save him. In the case of *Parkinson* v. *Hanbury* (1) the purchaser not only knew that no notice had been given, but he knew that there could have been no waiver, because the mortgagor was dead and had no personal representative. But does that apply to a case where the notice might have been waived? I should like to consider that question further before deciding it. But that is not the case here. I agree that the appeal must be dismissed.

Solicitor for the Plaintiff: *R. C. Hanrott.*

Solicitors for the Defendants: *Dubois, Reid, & Williams*, agents for *Clark, Sudbury, Williams & Green, Ludlow; G. R. H. F. Tocque; Marsden & Wilson.*

M. W.

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(1) 1 Dr. & Sm. 143.

C. A.
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March 15.

In re BUTLER'S TRUSTS.
HUGHES *v.* ANDERSON.

[1887 B. 5234.]

Joint Tenancy—Severance—Marriage—Wife's Chose in Action.

Marriage does not operate as a severance of the wife's joint tenancy in a *chose in action* (Bank stock) which has not been reduced into possession by the husband.

Baillie v *Treharne* (1) disapproved.

THIS case, on appeal from an order of Mr. Justice *North*, in Chambers, raised the question whether marriage operates as a severance of the wife's joint tenancy in a *chose in action* which has not been reduced into possession by the husband.

W. H. Butler, who died on the 11th of October, 1865, by his will, made in February, 1865, bequeathed to his executors, *John Gibbs*, *Edwin Butler*, and his wife *Elizabeth Butler*, his leasehold wine vaults, leasehold villa residence, with all the fixtures and appurtenances thereunto belonging, his household furniture, money in his possession at his death, also the sum payable on his death on a policy of insurance in the *Guardian* office with the accumulations thereon, with all other moneys and property belonging to him at his death, upon trust to pay all his just debts "and the residue to be appropriated to the support of my widow and her two children, *Bessie Alice* and *William Henry*. All arrangements I leave to the good sense of my three executors, who will kindly look to the best interests of my two children."

The testator left no real estate, and the balance of his personal estate, amounting to £849, had been invested on or previous to the 24th of January, 1867, in the purchase in the names of the surviving executors, *John Gibbs* and *Elizabeth Butler* (testator's widow) of £311 18*s.* 9*d.* Bank stock.

On the 25th of April, 1868, *Elizabeth Butler* was married to her present husband, *D. G. Anderson*. The testator left two children: *Bessie Alice*, who died an infant and unmarried in 1879, and

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(1) 17 Ch. D. 388.

William Henry, who died on the 19th of August, 1886, having attained twenty-one, and leaving a wife and one child, an infant.

In July, 1887, *S. W. Hughes* and *J. J. Colcutt* were appointed new trustees in the room of *John Gibbs* and *Edwin Butler,* and the balance of the Bank stock had been transferred into the names of Mrs. *Anderson, Hughes,* and *Colcutt.*

D. G. Anderson was not a party to any of the transfers or sales of the Bank stock, and had never interfered with it in any way whatever.

On the 31st of October, 1887, an originating summons was issued by *Hughes* and *Colcutt* against Mr. and Mrs. *Anderson* and the widow and infant child of *William Henry Butler* (the son), raising the question whether Mrs. *Anderson* was absolutely entitled to the testator's residuary estate.

Mr. Justice *North* held in Chambers on the 17th of November, 1887, that the widow and the two children of the testator became entitled to the residue as joint tenants, but (following *Baillie* v. *Treharne* (1)) that the marriage of the widow with *Anderson* in 1868 severed the joint tenancy, and that she thereby became absolutely entitled to one-third of the residuary estate, and that the legal personal representatives of *W. H. G. Butler,* the longer lived of the two children, was entitled to the remaining two thirds.

From this decision Mr. and Mrs. *Anderson* appealed.

Cozens-Hardy, Q.C., and *Marcy,* in support of the appeal:—

The marriage of Mrs. *Butler* did not operate as a severance of her joint tenancy in the *chose in action* (the Bank stock), which, not having been reduced into possession by her present husband, has not passed to him but remains vested in her. The effect in law of marriage, as stated in *Purdew* v. *Jackson* (2) by Sir *Thomas Plumer,* M.R., is to make only "a qualified gift to the husband of the wife's *choses in action,* viz. upon condition that he reduce them into possession during its continuance. . . . The wife's right is not divested by the marriage." Mr. Justice *North* considered himself bound by *Baillie* v. *Treharne.* That case, however, we submit was wrongly decided, inasmuch as the distinction

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(1) 17 Ch. D. 388.

(2) 1 Russ. 1, 66.

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taken by Lord *Coke* (1) between chattels real or in action, and chattels personal in possession—with the result, as explained by *Turner*, V.C., in *In re Barton's Will* (2), and adopted by *James*, V.C., in *Armstrong* v. *Armstrong* (3), that marriage will not sever a wife's joint tenancy in chattels real or in action or reversionary, because the property does not vest in the husband *ipso facto* on the marriage—was there completely overlooked by Vice-Chancellor *Malins*.

[BOWEN, L.J., referred to another report of *Baillie* v. *Treharne* (4).]

[They also cited *Baker* v. *Hall* (5).]

Cookson-Crackanthorpe, Q.C., and *Theobald*, for the Respondents:—

We can only argue the case upon the authorities as distinguished from principle. It must be admitted that where a woman who is joint tenant of a term of years, or chattel real, takes a husband, the joint tenancy is not severed; but it is expressly stated that: "otherwise it is of chattels personal, for if a woman who has personal goods takes husband, the law devests the property out of the wife, and vests it in the husband only:" *Bracebridge* v. *Cook* (6) (referred to in *In re Barton's Will* (7)). The fund in this case is not properly described as a *chose in action*, being a cash fund, or merely personal chattel, which upon marriage vested in the husband, and the investment of it in Bank stock cannot alter the rights of the parties.

[COTTON, L.J.:—At the date of Mrs. *Butler's* marriage with *Anderson* the fund had been invested in Bank stock.]

For the purposes of determining the rights of the joint tenants, at all events, it must be looked upon as a cash fund. With respect to chattels real the right of the wife is in truth reversionary, and cannot during the term be reduced into possession by the husband. But that is entirely distinguished from her right to what is a cash fund, falling within the term "personal goods," which is used by Lord *Coke* in the widest possible sense in the passage cited (1), where he refers to *Plowden* (2). And the language of *James*, V.C., in *Armstrong* v. *Armstrong* (3) seems to imply that a *chose in action* in possession was a personal chattel, the decision there only being that in the case of a reversionary *chose in action* which could not be reduced into possession during coverture, there had been no severance by marriage. We do not expressly rely on *Baillie* v. *Treharne* (4), as, independently of the operation of marriage, the covenant by husband and wife in their marriage settlement to assign was sufficient in that case to sever the joint tenancy.

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(1) Co. Litt. 185 b, 351 b.
(2) 10 Hare, 12, 14.
(3) Law Rep. 7 Eq. 518.
(4) 50 L. J. (Ch.) 295.
(5) 12 Ves. 497.
(6) Plowd. 416, 418.
(7) 10 Hare, 12.

[They also referred to *Prole* v. *Soady* (5).]

Cozens-Hardy, in reply :—

The test is whether the marriage has divested the ownership out of the wife and vested it in the husband. At the date of the marriage this Bank stock was not a mere personal chattel passing by delivery, but was a *chose in action*, in respect of which the husband had not on the marriage any immediate property, but only the right to reduce it into possession, which right has not been exercised.

COTTON, L.J. :—

This appeal raises a nice point, which, except for the case before Vice-Chancellor *Malins* (*Baillie* v. *Treharne*), has come now for the first time for decision. The question raised is whether, when a woman, entitled to an equitable interest as joint tenant in a *chose in action* (Bank stock), marries, the marriage by itself is a severance of the joint tenancy.

We must go back to the old authorities, which lay down the principle on which the question must be solved, although it was admitted on behalf of the Respondents that no principle could be found in support of their contention.

What says Lord *Coke* in his Commentary upon *Littleton* (6)?

(1) Co. Litt. 185 b.
(2) Page 418.
(3) Law Rep. 7 Eq. 522.
(4) 17 Ch. D. 388.
(5) Law Rep. 3 Ch. 220.
(6) 185 b.

"Two femes, joyntenants of a lease for yeares, one of them taketh husband and dieth, yet the terme shall survive; for though all chattels reals are given to the husband, if he survive, yet the survivor between the joyntenants is the elder title, and after the marriage the *feme* continued sole possessed; for if the husband dyeth, the *feme* shall have it, and not the executors of the husband. But otherwise it is of personall goods."

It is said that the words "personal goods" were used by Lord *Coke* in the widest possible sense, as including all personal property whatsoever. But there is another passage (1)—and it is a remarkable passage—which shews that Lord *Coke* did not use the words in that sense: "But chattels reals being of a mixt nature, viz. partly in possession, and partly in action, which happen during the coverture, the husband shall have by the intermarriage, if hee survive his wife, albeit he reduceth them not into possession in her lifetime; but if the wife surviveth him she shall have them. As if the husband be seised of a rent service, charge, or seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband shall have the arerages; but if the wife survive the husband she shall have them, and not the executors of the husband."

The distinction he draws between chattels real in possession and chattels real in action is somewhat curious. Then follows the passage which shews that in the previous passage he meant by "personal goods" that property which passes by hand, and property which on marriage passed from the wife to the husband. He proceeds (2): "But the marriage is an absolute gift of all chattels personals in possession in her owne right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them." That seems to lay down a principle which has been acted upon in later cases.

In *In re Barton's Will* (3) the question was not precisely that which now arises, but Vice-Chancellor *Turner* does appear to me to lay down the principle on which this question has to be decided. He refers to the passage which I have read from *Co. Litt.* (4) and proceeds: "The authority referred to by Lord *Coke* is the case of *Bracebridge* v. *Cook* (1). In that case, after stating that, if a woman having a term of years takes a husband, the husband cannot devise the term to another by his will; for the wife, at the time of the death, and before the death, had the estate in her, which will prevent and frustrate the devise; . . . . but otherwise it is of chattels personal; for if a woman who has personal goods takes a husband, the law divests the property out of the wife and vests it in the husband only; and so it is if a stranger gives personal goods to a *feme covert* and to a stranger, the jointure is presently severed by the law, so that the survivor of the wife or of the other shall not have the whole, but the husband and the other are tenants in common presently, and the title of such of them as first dies shall go to the executors." He means that the joint tenancy is severed in the goods, because in the chattels there referred to, the husband has, by force of his position, the right to take them, and by taking them to divest the property out of the wife. Then the passage goes on: "For chattels personal are esteemed in law of less value and are of a baser degree than chattels real, and so there is a diversity between them: and it is added, that the case being one of a chattel real, the coverture of the wife makes no severance of the jointure, nor is it any impediment to the plaintiff having the whole as survivor." So far the Vice-Chancellor has been dealing with the case of *Bracebridge* v. *Cook*, and he proceeds: "Thus it appears, that, in the case of chattels real, the joint tenancy is not severed by the marriage, because the property does not vest in the husband; but in the case of chattels personal, it is severed by the marriage, because the property does vest in her." The report says "her," but that is obviously a mistake for "him." In the next following passage the Vice-Chancellor does speak of the property in the case before him as "a mere chattel personal;" but it is clear that what he meant in the previous passage by chattels personal was property of such a character that, if in possession of the wife at the date of her marriage, it would, immediately after the marriage, be divested out of the wife, and her possession become the possession of the husband. But as regards a *chose in action*, the case is different. It was not, and could not be, contended that the property in a *chose in action* of the wife, is of such a nature that, by force of the marriage, it becomes divested out of the wife, and vested in the husband; and it would be a strange thing if marriage in respect of such property were to have any greater effect than it would as regards a wife's undivided moiety in a term or chattel real. As regards the latter, the husband can at once execute a deed which will have the effect of severing the joint tenancy, but he cannot do that in regard to her *choses in action*. I do not see, therefore, why marriage should sever the wife's joint tenancy in a *chose in action*, while it does not do so in her chattels real. We were referred to a passage in the judgment of *James*, V.C., in *Armstrong* v. *Armstrong* (1), which would look as if that learned Judge considered that a *chose in action* in possession was to be considered as personal goods within the meaning of the passage in *Co. Litt.* He does not take the point which we now have to decide, because it was not necessary for his purpose, the *chose in action* there being reversionary, "which the husband could not have reduced into possession during the coverture;" but I take it that he did not intend to apply to a *chose in action* which is not reversionary the term "chattel personal in possession," in the sense in which that term is used as meaning a chattel which, by the mere act of marriage, becomes vested in the husband. The only case in favour of the Respondent's view is *Baillie* v. *Treharne* (2), and there Vice-Chancellor *Malins* undoubtedly does express a view which is contrary to what I consider to be the true one. He says (3): "A joint tenancy can always be severed by assignment, and that may be done either by deed, or by operation of law as on marriage by which the personal property of the wife is given to the husband as much as if it was assigned by deed." That, no doubt, is the case with regard to personal goods which are capable of being taken into manual possession. But as regards the wife's *choses in action*, it is wrong to say that marriage has the same effect of assigning them to the husband as a deed executed by the wife before marriage would have had. On the marriage the husband acquires the right to reduce her *choses in action* into possession, or, if they are reversionary, he can reduce them into possession if he be the survivor. But that is a right entirely different from what the husband would get if the wife were to assign such property to him by deed executed before marriage. In my opinion the Vice-Chancellor did not take note of what is the true effect of marriage upon the wife's *choses in action*, and I must dissent from his decision, which Mr. Justice *North* has followed. The appeal will, therefore, be allowed.

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(1) Page 351 a.
(2) Page 351 b.
(3) 10 Hare, 12, 14.
(4) Page 185 b.

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(1) Plowd. 418.

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(1) Law Rep. 7 Eq. 522. (2) 17 Ch. D. 388. (3) 17 Ch. D. 390.

LINDLEY, L.J.:—

I am of the same opinion. The only intelligible rule to apply is that pointed out in *Plowden* (*Bracebridge* v. *Cook* (1)), which is an intelligible working rule. If property be vested in a woman and another, or others, as joint tenants, and she afterwards marries, what is the effect of her marriage upon that property? If the effect is to vest the property in the husband then there will be a severance of the joint tenancy. That is the view of Lord *Coke*, *Plowden*, and everyone. If on the other hand the act of marriage does not vest the property in the husband, then there is no severance. That is the view of Lord *Coke*, *Plowden*, and everyone except Vice-Chancellor *Malins*, who in *Baillie* v. *Treharne* (2) did hold that marriage effected a severance of the joint tenancy in a wife's *chose in action*. I think that was an oversight on the part of the learned Judge. There is no authority in favour of the Respondents' view except that case. Although it is true that *In re Barton's Will* (3) and *Armstrong* v. *Armstrong* (4) may have been decided on the ground that the fund was reversionary, which was a good ground, still the other ground, viz., that it was a *chose in action*, might have been taken. At any rate there is nothing in either decision against the rule I have suggested. Unless we adopt some workable and intelligible rule we shall only be creating a difficulty. No reason has been assigned why on principle there should be any difference in respect of severance between a wife's chattels real in possession, and her *choses in action* not being reversionary, and I am unable to see why there should be any difference between them.

(1) Plowd. 418.
(2) 17 Ch. D. 388.
(3) 10 Hare, 12.
(4) Law Rep. 7 Eq. 518.

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BOWEN, L.J.:—

I am of the same opinion. We must seek to decide the question on principle, and for that we may look to the old authorities. I was struck by the admission on behalf of the Respondents that no principle could be found to support their case. I think on looking at the old authorities, not only that the point is decided, but also that the principle underlying those authorities is that the effect of marriage on particular property, in which a woman has an interest as joint tenant, depends on whether the marriage divests the property from the wife and vests it in the husband. If it does, then the joint tenancy is severed; if it does not there is no severance. Where some *novus actus interveniens* on the part of the husband is required, *e.g.*, an assignment of the wife's chattels real or reduction into possession of her *choses in action*—in neither of these cases does marriage operate as a severance. The admission which I have referred to is not inconsistent with the earlier passage cited from *Co. Litt.* (1). But the later passage (2), which has also been referred to, to my mind throws light on the words "personal goods" used in the earlier passage. I think the principle on which the case must be decided is shewn by *In re Barton's Will* (3). That case was decided on principle. The learned Vice-Chancellor having first explained the law as to the wife's chattels real, or leaseholds, and then as to her chattels personal as distinguished from her chattels real, proceeds to consider the question with reference to the particular property (a chattel personal in which the wife's interest was reversionary), and thus states the test: "The case therefore seems to me to fall within the principle of the rule which applies to chattels real, and not of the rule which applies to chattels personal; and, consequently, the joint tenancy was not severed by the marriage, but continued till the death of the wife." That case therefore shews the principle.

In chattels personal, marriage, by operation of law, divests the property in them out of the wife. In the case of chattels real (leaseholds) it does not: the husband acquires a right to make the property his own, but a *novus actus interveniens* on his part is

(1) Page 185 b.

(2) Page 351 b.

(3) 10 Hare, 12.

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necessary. In the case of a *chose in action* marriage does not divest the property out of the wife, and all that the husband acquires by the marriage is a right to reduce the *chose in action* into possession. I think, therefore, both on principle and on authority that the point is decided; and the interest of the wife in this case being an interest in a *chose in action*, the joint tenancy was not severed by the marriage. I will add nothing to what has been said by the other Lords Justices with reference to *Baillie* v. *Treharne* (1).

Order of Mr. Justice *North* discharged so far as it declared the marriage of the Defendant Mrs. *Anderson* in 1868 to be a severance of the joint tenancy.

Solicitors for all Parties: *Collis & Mallam.*

F. G. A. W.

Distinguished. WRIGHT *v.* MACADAM.
[1949] 2 All E.R. 565.

BIRMINGHAM, DUDLEY AND DISTRICT BANKING COMPANY *v.* ROSS.

[1886 B. 3791.]

C. A.
1887
KEKEWICH, J.
Nov. 11, 12, 19.
C. A.
1888
March 20, 21, 22, 27.

Light—Implied Grant—Derogation—Building Scheme—Intervening Strip of Land—Obstruction—Injunction.

The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee.

The corporation of a town granted a lease to the Plaintiffs of a piece of land and a newly erected building "with the rights, members, and appurtenants to the said premises belonging." The building abutted on a passage twenty feet wide, which the corporation agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the Defendant, who erected on the site of the old buildings a house eighty feet high, which materially interfered with the Plaintiffs' light. The land on both sides of the passage was part of a larger piece of land laid out by the corporation under a building scheme for the improvement of the town:—

Held (affirming the decision of *Kekewich*, J.), that there was no grant, express or implied, in the lease to the Plaintiffs of a right to uninterrupted light to the new building;

That the obligation on the corporation not to obstruct the Plaintiffs' light which was to be implied from the relation in which they had placed themselves to the Plaintiffs by granting them the lease, must be measured by the circumstances existing at the date of the lease and known to both parties;

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(1) 17 Ch. D. 388.

That having regard to the fact that the Plaintiffs knew that the land was being laid out for building, and that they had stipulated that there should be a passage twenty feet wide adjoining the new building, they had no right to complain of the obstruction caused by the Defendant's house, and an injunction was refused.

Whether they would not have been entitled to an injunction if their light had been entirely destroyed, *quære*.

The rule, that a man who grants a house with lights cannot erect new buildings so as to obstruct those lights, applies to the case where the grantor purposely leaves a strip of land intervening between the house and the lands retained.

IN the year 1877 the corporation of *Birmingham* as the local authority under the *Artizans and Labourers' Dwellings Improvement Act*, 1875, made a scheme for the improvement of an unhealthy area within the borough, which scheme was confirmed by the *Local Government Boards Provisional Orders Confirmation and Labourers' Dwellings Act*, 1876. Upon the maps accompanying the scheme were shewn some intended new streets; and, amongst them, a main street running through the whole area of the scheme of the width of sixty-six feet, since constructed and called *Corporation Street*. By the 9th section of the first-named Act the corporation were empowered to sell or let all or any part of the area to which the scheme related to any purchasers or lessees for the purposes and under the condition that such purchasers or lessees would as respects the land so purchased by or leased to them carry the scheme into execution, and in particular the corporation might insert in any grant or lease of any part of the area provisions binding the grantee or lessee to build thereon as in the grant or lease prescribed.

By a building agreement, dated the 13th of August, 1880, and made between the corporation of the one part, and *J. W. Daniell*, a surveyor and architect, of the other part, the corporation agreed to grant a lease to *J. W. Daniell* of a piece of land, having a frontage of about twenty-two yards to *Corporation Street* on the west, and of about twenty-six yards on the south to a new street to be called *Warwick Passage*, and comprising about 605 superficial square yards, for the term of eighty years from the 25th of

December, 1880, at a ground rent of £1253 8*s.* per annum, for the purpose of building shops, auction rooms, and premises thereon. The lease was to be executed so soon as the buildings were completed. By the 3rd clause of the agreement the corporation undertook that they would on or before the 25th of March, 1881, make and construct *Corporation Street* and *Warwick Passage*, the latter to be twenty feet in width.

Pursuant to this agreement *J. W. Daniell* erected buildings on the land to a height of forty-eight feet facing *Corporation Street* and *Warwick Passage*, and by deed, dated the 28th of September, 1882, the corporation demised the piece of land and the newly constructed buildings thereon, "together with the rights, members, and appurtenances to the said premises belonging" to *J. W. Daniell* for the term and at the rent stated in the agreement. "Lights" were not expressly mentioned.

By deed dated the 1st of June, 1883, *J. W. Daniell* assigned these leasehold premises for value to the Plaintiffs for the residue of the term.

By another building agreement, dated the 31st of March, 1886, and made between the corporation of the one part, and the Defendant, *W. Ross*, a builder, of the other part, the corporation agreed to grant a lease to the Defendant, *W. Ross*, of the plot of ground on the other side of *Warwick Passage* and immediately opposite to the Plaintiffs' buildings, and fronting about thirty-seven yards on *Warwick Passage* and about thirty-four yards on *Corporation Street*, for the term and at the rent therein mentioned for building purposes; and soon afterwards the Defendant commenced erecting an extensive block of buildings on his plot, his plans shewing an elevation of about eighty feet.

Soon after the Defendant commenced building the Plaintiffs warned him of the rights they claimed in respect of their windows, but he replied that he would proceed with his buildings unless stopped by injunction. Thereupon, on the 10th of August, 1886, the Plaintiffs issued the writ in this action, claiming an injunction to prevent the Defendant building to such a height as by obstructing the access of light and air to the premises demised by their lease to interfere with the comfortable enjoyment of the said premises and the easements belonging thereto as the same were demised by the said lease, or otherwise to derogate from the grant made by the said lease; and a mandatory injunction to compel the taking down of any building or structure erected by the Defendant so as to cause such interference or derogation as aforesaid. The Plaintiffs did not apply for an interlocutory injunction, and the Defendant proceeded with and completed his buildings without interruption. This was the trial of the action.

It appeared from the evidence that it was well known to *J. W. Daniell* when his lease was granted that the land on the opposite side of *Warwick Passage* belonged to the corporation, was included in the improvement scheme, was a valuable site, and would sooner or later be built upon. It also appeared that the Plaintiffs' buildings were below the average of those fronting *Corporation Street*, whilst the height of the Defendant's building, having regard to the same circumstances, was not unreasonable; and that the Defendant's buildings did materially affect the light coming to the Plaintiffs' buildings.

The action came on for hearing before Mr. Justice *Kekewich* on the 11th of November, 1887.

Warmington, Q.C., and *Phipson Beale*, for the Plaintiffs:—

The existence of *Warwick Passage* does not deprive us of our right to such light and air as are necessary for the reasonable enjoyment of our property. We are purchasers for value without notice of any reservation on the part of the corporation to obstruct our lights. If our premises had not been part of a building scheme we should have been absolutely entitled to an injunction. But as Mr. *Daniell* knew of the scheme, our right is limited to what the Court considers we might reasonably expect. Eighty feet is too high. The evidence shews that our lights are materially affected, and it is clear that there was no such expectation of building as to deprive us of the relief claimed: *Allen* v. *Taylor* (1); *Rigby* v. *Bennett* (2); *Beddington* v. *Atlee* (3). The Court has jurisdiction to order the buildings to be reduced to the proper level: *Smith* v. *Day* (4).

(1) 16 Ch. D. 355.
(2) 21 Ch. D. 559.
(3) 35 Ch. D. 317.
(4) 13 Ch. D. 651.

Barber, Q.C., and *Methold*, for the Defendant:—

There is no case in which the doctrine of implied grant has been applied where there has been some other land intervening. It only applies where the lands are immediately adjoining, and the cases cited only apply to this latter principle, and are clearly distinguishable on this ground.

[KEKEWICH, J., referred to *Russell* v. *Watts* (1).]

It is submitted that it is absolutely essential to the existence of an easement or *quasi* easement that there should be some connection between the dominant and servient tenement. The stipulation in Mr. *Daniell's* agreement that *Warwick Passage* should be twenty feet wide shews that he knew that buildings would be erected on the other side, and was satisfied to take his chance, provided the passage was made the agreed width. There was no implied obligation here by the corporation that they would do nothing on their other lands to interfere with their lessees' enjoyment of the lights under his lease. But if there was, it was a personal obligation and does not run with the land. The fact that the 20th section of the *Artizans &c., Act*, 1875, extinguishes all easements existing at the time when the scheme is put in force negatives any inference that new easements were intended to spring into existence directly the scheme was carried out. This would render such a scheme nugatory. Therefore the corporation held the land free from all easements; and yet, if the Plaintiffs are right, the corporation are to be at once restricted to such a height of building as the Plaintiffs consider proper. The height of the Plaintiffs' buildings is below the average of all the houses facing *Corporation Street*, and their predecessor in title, Mr. *Daniell*, knew that the land on the other side of *Warwick Passage* would probably be built upon, and must therefore be taken to have consented to buildings being erected to a reasonable height.

Warmington, in reply.

1887. Nov. 19. KEKEWICH, J.:—

The Court is asked to apply a settled rule of law to circumstances which test it somewhat severely. The rule has often been stated, but nowhere more clearly or concisely than in the judgment of Sir *George Jessel* in *Allen* v. *Taylor* (1). After referring to *Palmer* v. *Fletcher* (2), which is one of the earliest authorities on the point and the foundation of all that have followed, he says (3): " Where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights." In this case there is a demise by the corporation of *Birmingham* to the predecessors in title of the Plaintiffs of a house then erected and looking over *Warwick Passage* on to land occupied by comparatively low buildings, since pulled down, followed some four years later by a demise to the Defendant of that land for the purpose of erecting buildings considerably higher than the low buildings and also than those of the Plaintiffs'. According to the rule of law above stated, it was not competent to the corporation to erect these new buildings, which necessarily obstruct the Plaintiffs' lights, and it was not and, consistently with principle and the authorities, could not be asserted that the Defendant has any better title than the corporation, his grantor. Regarded from this point of view the case is plain enough, and the Defendant is liable to an order to pull down his newly erected building to such an extent as to avoid obstruction to the lights of the Plaintiffs' building, or, if the Court thinks fit, to make compensation in damages. But before enforcing this liability, one must investigate the circumstances under which it arises, and be careful to see that a rule of law is not stretched beyond its just limits, or applied to facts which constitute an exception to it. That there are exceptions is as well established as the rule itself. Mr. *Barber* took a new point. He said that the rule had never been applied, and argued that it ought not to be applied, to any case in which the obstructing building stands on land severed from the site of that containing the lights which are obstructed. One would expect litigation generally to arise where the buildings are on adjoining plots, and the cases shew that this in fact happens; but I see no reason for attaching essential importance to this circumstance, nor does its absence appear to me to exclude the application of the principle on which the rule depends. A house built on land having a substratum

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(1) 10 App. Cas. 590.

(1) 16 Ch. D. 355.
(2) 1 Lev. 122.
(3) 16 Ch. D. 357.

of wet sand might easily subside by reason of the removal of the like substratum at some distance from its walls, and if that removal were from land owned by the vendor of the house, I cannot but think that he would be held liable for having deprived that house of support. Likewise injury might be occasioned by interference with watercourses or drains, and I think with the like result. Obstruction of light by buildings erected at a moderate distance is, however, of more frequent occurrence, and it has occurred here. I should be most unwilling to hold that what would not have been allowed if *Warwick Passage* did not exist is permissible because that passage of twenty feet in width separates the two buildings. There is authority on the point. In the report of *Palmer* v. *Fletcher* (1) it is mentioned that afterwards, in Michaelmas Term, 16 Chas. 2, a like judgment was given between the same parties for erecting a building on another part of the land purchased, whereby the lights of another new messuage were obstructed. The second "another" is an interpolation of the translator, and does not occur in the original report, which speaks of the new messuage. If, therefore, as appears to be the fact, the first building was on land immediately adjoining the house in respect of which the plaintiff sued, the other must have been erected on land separated from it, and yet the principle held good. It is in fixing the limit of the Plaintiffs' right against the Defendant that I encounter the real difficulty. A large majority of the cases to which I have referred suggest no limit, but lay it down, as it was laid down in *Palmer* v. *Fletcher*, that the grantor of a house or any one claiming under him must not obstruct the lights. This must of necessity be taken to mean obstruction in excess of that existing at the date of the grant, but apart from this no limit is either mentioned or implied. In some cases—*e.g.*, *Hall* v. *Lund* (2)—there are observations to the effect that an implied grant must be construed reasonably, but they scarcely afford a guide to a satisfactory solution of the question, what is reasonable. The Plaintiffs' building, measuring to the top of the wall is forty-eight feet high, and that of the Defendant is eighty feet. I know not how high the old low building was, but, bearing in mind that *Warwick Passage* gives an interval of only twenty

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(1) 1 Lev. 122.

(2) 1 H. & C. 676.

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feet, it is obvious that a large proportion of the Defendant's buildings must obstruct the Plaintiffs' lights, and I conclude from what was stated that this proportion would not be seriously diminished by making any fair allowance for the obstruction of the old low buildings. To what level would it be reasonable to require the Defendant to pull down his house? Mr. *Warmington*, on behalf of the Plaintiffs, appreciated the difficulty of this question, and expressed himself content to limit the Defendant to the height of the Plaintiffs' own buildings because (for he was bound to find a reason) that is the height to which, having regard to all the circumstances, the Plaintiffs' predecessor in title might reasonably have expected any erection on the other side of *Warwick Passage* to extend. In support of this view, he referred to *Rigby* v. *Bennett* (1), but I am not satisfied that it gives him the rule required. It is one of the cases in which the reasonable limit is suggested, and both Sir *George Jessel* and Lord Justice *Cotton* based their judgments on the conclusion that the Defendant could have built in a reasonable way on the reserved land, without inflicting the injury which he in fact inflicted on the Plaintiffs' house. But in connection with this there is mentioned one point which is expressly reserved. I will take it from the judgment of Lord Justice *Cotton*, who thus states it (2): "It is not necessary in my opinion to consider what would be the consequence if the grantee knew that the grantor intended to use the adjoining land for a particular purpose, and the right claimed by the grantee is inconsistent with that purpose. That question may hereafter arise, and I give no opinion upon it." It seems to me that it has arisen here, and that I am compelled to decide it. There is no contest about the facts. Mr. *Daniell*, under whom the Plaintiffs claim, must be taken to have known that the corporation of *Birmingham* had made large purchases of land for the purpose of constructing a new and important thoroughfare, and that this could properly be done and that they could recoup their expenditure only by selling or letting the land for building purposes. He must be taken to have known generally what class of buildings were likely to be erected in a broad street in a commercial town. As is said by Mr. Baron *Wilde* in *Hall* v. *Lund* (3), each case must depend on its own circumstances, and the intention of the parties must be ascertained from the character, state, and use of the premises at the time of the grant. Mr. *Daniell* thought it convenient and profitable, though it is in evidence that in this he was mistaken, to erect the buildings now owned by the Plaintiffs, but he ought, in my judgment, to have anticipated, and I think he must be taken to have anticipated, that other assignees of the corporation would, or at least might, erect buildings of a greater height. There is evidence to shew that with such ground rents as the advantages of the sites enable the corporation to demand, buildings must be high, in order to be profitable, and although Mr. *Daniell*, and perhaps others, did not appreciate this at the date of his lease or agreement for a lease, I cannot exclude from imputed anticipation what would in truth have been reasonably anticipated. The difference between forty-eight feet and eighty feet, though large when considered with reference to the actual obstruction of light, is not I think large in comparison of neighbouring houses in such a locality. Compelled, as I think I am, to decide, not by laying down any general rule, but only with reference to the particular case, the question left open by *Rigby* v. *Bennett* (1), I hold that the grantee of the Plaintiffs' house knew that the grantor intended to use the land on the other side of *Warwick Passage* for the particular purpose of building houses of business, and that what has been in fact erected thereon is not in excess of what he must be taken to have expected and assented to be erected. I therefore give judgment for the Defendant, and he is entitled to his costs of action.

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(1) 21 Ch. D. 559.
(2) 21 Ch. D. 569.
(3) 1 H. & C. 676.

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From this judgment the Plaintiffs appealed. The appeal came on for hearing on the 20th of March, 1888.

Sir *Horace Davey*, Q.C., *Warmington*, Q.C., and *Beale*, Q.C., for the Appellants:—

The lease from the corporation granted to *Daniell* all the rights belonging to the premises. That must include all lights actually enjoyed at the time. There was, therefore, an obligation that they and their lessees should not obstruct his windows by erecting any building higher than the buildings then existing. We have the same rights as against the corporation as if the lights were ancient lights: *Allen* v. *Taylor* (1); *Leech* v. *Schweder* (2). But we do not seek to enforce our right to that extent: we claim only that the Defendant's buildings should not be higher than our own. Independently of the express grant of the easement, there is an implied grant of all lights necessary for the reasonable use of the premises: and the corporation cannot derogate from their own grant. We admit that we knew that the corporation would build houses on the other side of *Warwick Passage*, and that they would probably be higher than the old buildings, but not that they would build them so as to obstruct our lights. The previous negotiations with the corporation cannot be taken into account, the rights of the parties must be taken as they were at the date of the lease: *Wheeldon* v. *Burrows* (3); *Rigby* v. *Bennett* (4); *Russell* v. *Watts* (5). It is contended by the other side that there was no implied grant because the two tenements were not adjoining. There is no foundation for that distinction; but in the present case the tenements did in fact adjoin, for at the time of the lease *Warwick Passage* was part of the site retained by the corporation.

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(1) 21 Ch. D. 559.

Barber, Q.C., and *Methold*, for the Defendant:—

There is no case in which the doctrine of implied grant has been applied where there has been some other land intervening: it only applies where the lands are immediately adjoining. Here *Warwick Passage* intervened between the Plaintiffs' land and the Defendant's land. There is no connection between the dominant and servient tenements: *Palmer* v. *Fletcher* (6). The Plaintiffs' contention is inconsistent with itself. They claim the same right as if their lights were ancient lights, but wish to limit the injunction to building houses higher than their own. On what principle is this limit arrived at? *Daniell* knew that the land was cleared for the purpose of rebuilding under a building scheme, and that a larger and better class of houses would be built. If he had wished to protect himself he might have made some special stipulation; but the only stipulation he made was as to the width of *Warwick Passage*, and it may be supposed that he considered that sufficient protection. All the surrounding circumstances, which were known to both parties, must be taken into consideration to ascertain whether any mutual obligations arose between the parties. And here we say that there were no obligations with respect to the lights: *Hall* v. *Lund* (1).

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(1) 16 Ch. D. 355.
(2) Law Rep. 9 Ch. 463.
(3) 12 Ch. D. 31.
(4) 21 Ch. D. 559.
(5) 10 App. Cas. 590.
(6) 1 Lev. 122.

[LINDLEY, L.J., referred to *Curriers' Company* v. *Corbett* (2).]

Sir *H. Davey*, in reply, referred to *Kelk* v. *Pearson* (3); *Bayley* v. *Great Western Railway Company* (4).

1888. Mar. 27. COTTON, L.J.:—

This is an appeal by the Plaintiffs against a decision of Mr. Justice *Kekewich*, who dismissed the action with costs, and the object of the action is to restrain an interference by the Defendant with the light which, but for the building of the Defendant would have access to the windows of the house belonging to the Plaintiffs. It is not a case of ancient lights. It is a question depending on the grant from the corporation of *Birmingham* to the Plaintiffs; the Defendant being also a lessee under that corporation. [His Lordship then shortly referred to the facts, as stated above, and proceeded:—]

On what ground do the Plaintiffs contend that they have a right to interfere with the Defendant's building, and to have an injunction to compel the Defendant to pull down a considerable portion of that building. It was put by Sir *Horace Davey* on this ground—that they had an express grant of light which entitled them to all the light which would come to their windows if there were no building erected on the other side of *Warwick Passage* higher than the building which there was at the time when the lease was granted to them; but the Plaintiffs by their action do not seek to have the entire building pulled down, or to have it pulled down to the level of the old building which was

(1) 1 H. & C. 676.

(2) 2 Dr. & Sm. 355.

(3) Law Rep. 6 Ch. 809.

(4) 26 Ch. D. 434.

then existing, and they are content to say, "We will not require more of the Defendant's building to be pulled down than will bring it to the same height as our own house." That was at first a little misleading, but that ought not to be used to the prejudice of the case of the Plaintiffs, who put their case, on the ground that by the lease there is an express grant to *Daniell*, their predecessor in title, of such light as could then have access to his windows. Now that is a question which we must consider in the first instance, because it is most material in the present case. In the lease we do not find that there is any express mention of lights. It is a demise on the 28th of September, 1882, of the piece of ground and the house upon it, and it is not perhaps immaterial to read some words which are here, "together with the shops, messuages, or dwelling-houses, auction rooms, store rooms, and buildings erected thereon, together with full and free right and liberty to construct, maintain, and use a vault or vaults under the footway. . . . And also together with the rights, members and appurtenances to the said premises belonging." Here there is no express grant of light. Of course a conveyance of a house would carry whatever right there was to any light which came to the house—the right I mean as an existing right at the time that the lease was granted. But that is not the contention. The contention is that there is an express grant by the landlord of a new easement, or that which must be considered as a new easement, over the landlord's land which was on the other side of *Warwick Passage*. But in my opinion that is not the proper construction or meaning of these words. It is very true that when a man grants a house, he grants that which is necessary for the existence of that house, and it might have been a serious question here if it had been shewn that the interference with the light was of such a character as entirely to prevent the house of the Plaintiffs being used as a house. But that was not the case made. It was only admitted by the Defendant that there was such an interference as would justify the Court in granting an injunction if there had been ancient windows, or if the grant was such as Sir *Horace Davey* contended. I ought here to refer to sect. 6, sub-sect. 2, of the *Conveyancing Act*, 1881, (to shew that it has not been overlooked, although it was not, I think, mentioned in the argument), where it is enacted that "a conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses," and many other things, "passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them or any part thereof." Then of course there is a proviso unless the contrary intention appears from the document.

But in my opinion, even with the assistance afforded us by the language of this deed, this could not be said to be a light, within the meaning of this section, enjoyed with the house. The house had only recently been erected; and at the time when this lease was granted it was obvious to both parties that this was a large tract of land bought by the corporation of *Birmingham* for the purpose of effecting an improvement, and for the purpose of the land being laid out so as to have buildings upon it, and at the time when the lease was granted *Corporation Street* had only just been formed: there was no plan of the buildings upon it, but it was the duty of the corporation, as of course it would be their interest, to lay this out in such a way as to make it available for recouping the expenses, and also to be an improvement to this portion of *Birmingham*. Therefore, I think it could not be said that the light coming over that low building to these windows could be considered as enjoyed with it within the meaning of this section. The light did in fact at the time come over that building; but it came over it under such circumstances as to shew that there could be no expectation of its continuance. It had not been enjoyed in fact for any long period; and in my opinion it was enjoyed under such circumstances, known to both parties, as could not make it light enjoyed within the meaning of that section. That expression must mean not light which a person has a right to under the statute, but that which he has enjoyed under circumstances which would lead to an expectation that the enjoyment

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of that light would be continued, and that it would not be simply precarious.

Then as to the words of this lease which I have read, "and also together with all rights, members, and appurtenances to the said premises belonging," the case under the *Conveyancing Act* would have been stronger if it had not been for them; for they point to an intention to convey with the house only such rights, if any, as belong to the premises, and, therefore, in my opinion the introduction of those general words of conveyance points to this, that the light which in fact came at the time of the lease to this house could not be considered as being expressly granted by any words of this lease.

If that is so, we have to consider what the rights of the Plaintiffs really are; and, in my opinion, such rights as they have must be implied rights. I think myself that it is a question whether there is any implied obligation on the corporation (to which of course the Defendant would be subject) not to interfere with these lights. I say that, because that was the view which, not only I, but the Master of the Rolls took in a previous case of *Rigby* v. *Bennett* (1), and I think that is the effect of the judgment of Lord *Cranworth*, when Lord Chancellor, in *Caledonian Railway Company* v. *Sprot* (2). By an implied obligation or an implied right I mean this: an obligation or right arising not from the express words of an instrument, nor from that which, having regard to the circumstances, must be considered the true meaning and effect of the words in the instrument; but that obligation or that right which results from the position into which the parties have placed themselves by the contract. For instance, where one man grants to another a house, then *primâ facie* he cannot interfere with that which he has granted; there is an implied obligation on him not to interfere with that which he has granted; namely, the house, and enjoyment of the house. That obligation arises, I repeat, not from any interpretation of the conveyance, but from the duty which is imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee.

But when the question is as to an implied obligation we must

(1) 21 Ch. D. 559.

(2) 2 Macq. 449.

have regard to all the circumstances which existed at the time when the conveyance was executed which brought the parties into that relation from which the implied obligation results; I quite agree that we ought not to have regard to any agreement during the negotiations entered into between the Plaintiffs and the corporation; except in this way; if we find that any particular space in fact was left open at the time when the lease was granted, and that that open space was contracted to be left open during the negotiation which took place, and is not referred to in the lease, we must have regard to the fact of that open space being left, and we must have regard to the fact that by agreement between the parties the lessor had bound himself not to build upon that space; and also we must, in my opinion, in determining what obligation results from the position in which the parties have put themselves, have regard to all the other facts which existed at the time when the conveyance was made, or when the lease was granted, and which were known to both parties.

Now, what was the existing state of things here? There was this new street of very great width: there was this open passage —*Warwick Passage*—stipulated to be twenty feet in width, and which was there existing, and it was obvious to *Daniell*, as well as to the corporation, that the adjoining land would be utilised for the purpose of a street; that it would be utilised for the purpose of the corporation making money out of it; and although one was at first startled at the great height of this house, yet, in my opinion, *Daniell*, when this lease was granted, being a lease of a piece of land in a new street for the purpose of having a building put upon it, was acquainted with the obvious fact that the corporation were going to lay out the remainder of the street for building houses suitable for the locality. But if the contention of Sir *Horace Davey* were the true one, that the Plaintiffs have a right to such light as then came to their building, it would entirely prevent the corporation from utilising the land in any way except by putting up a low building like the stables, or one-storied building, then existing upon the land on the other side of *Warwick Passage*. That being so, it is, in my opinion, impossible to imply an obligation on the corporation not to let their land in any way for building otherwise than for erecting such building as was on it at the time; and if we cannot do that I cannot see how any line can be drawn as to the obligation they undertook as regards building; because, unless we say that they undertook an obligation not to put any building higher than that which then existed, I cannot see where we can impose any obligation or fix any line as to the height to which buildings might be put. The Plaintiffs say reasonably, "We do not want all the Defendant's building pulled down;" but I feel a difficulty in saying that they have any right as regards the height of buildings erected unless they can establish their right to say that there should be no building put up so as to interfere with the light which at the time when the lease was granted passed to this house. If there had been an express grant, then it would have been the duty of the grantor or of the lessor to expressly state what right he reserved to himself. A reservation of right by a grantor to himself is a very different thing from an implied obligation undertaken by a grantor in consequence of the position in which he places himself. *Wheeldon* v. *Burrows* (1) is a case which on that point would be a strong authority, and which I, of course, agree with. Looking at the circumstances existing at the time when the lease was made, I am of opinion that here the Plaintiffs cannot assert any implied obligation on the part of the corporation which will enable the Plaintiffs to say that there is an interference with their rights on the part of the Defendant.

There is one further point to which I must refer. It was argued by Mr. *Barber* that there could be no implied obligation where the land granted was not immediately connected with land retained by the grantor. That question does not arise for decision, but I do not in any way express an opinion favourable to that contention.

On the grounds which I have already stated, I think the appeal ought to be dismissed.

LINDLEY, L.J.:—

In order to decide this case properly it appears to me that there are two preliminary points for investigation. First of all, what are the terms of the lease to *Daniell?* That is the first question; and the second is, under what circumstances was that lease granted?

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(1) 12 Ch. D. 31.

Now, if we look at *Daniell's* lease, which is the important document in this case, we do not find in it any express words creating any new easement over the land retained by the corporation. There is nothing express about that; it is a grant of a house, and so on, as Lord Justice *Cotton* has mentioned more in detail, but we do not find any express words creating any new easement.

That being so, we must proceed to consider what was the state of things existing at the time that lease was granted. I think Sir *Horace Davey* was quite right in saying that we are not to go into the preliminary negotiations which resulted in the final lease. They might be important, and perhaps would be necessarily important, if we were considering whether the lease should be rectified or not, but for the purpose of construing the lease all such considerations as those ought to be disregarded. But the state of the property is all important; and what was being done with it is all important.

Now we know that the area on which the Plaintiffs' house, and on which the Defendant's house was built, was recently created by the destruction of a mass of houses by the corporation, and the whole area was intended to be relaid out and built upon by the corporation. One part of the area was to be traversed by a large street called *Corporation Street*, and *Daniell's* house was to face *Corporation Street*. On the side of *Daniell's* house, where there is now a narrow street called *Warwick Passage*, there had been no such street; it was, as I understand it, a mass of houses —that street did not exist at all. That street was created at the time that *Daniell's* house was agreed to be let, and before or at the time when it was begun to be built; and it appears to me that the history of that street is the key to the situation here. Having regard to the creation of that street, and the facts to which I have alluded, it appears to me that it is impossible fairly and properly to imply such an easement as that for which Sir *Horace Davey* is driven to contend. It appears to me that the true construction of *Daniell's* lease, coupled with the circumstances to which I have alluded, is this: that if we talk of these easements as newly created, what was newly created was a right to such an amount of light as would come over the corporation land to *Daniell's* house after the corporation had built what they liked upon the other side of that twenty-feet street. That is the only implied grant which I can infer, or arrive at, from the terms of the deed, and from the circumstances to which I have alluded.

Now, if that be true, of course there is no derogation from the grant at all; and you are clear of *Wheeldon* v. *Burrows* (1) and every other case. The grant of an easement of this kind is, properly speaking, an implied covenant by the grantor not to use his own land so as to injure the rights of *Daniell* and those claiming under him. If we look at it in that point of view the very same result is arrived at. What sort of obligation was the corporation laying itself under as regards the obstruction of *Daniell's* lights? I can come to no other conclusion than this, that it was perfectly understood and known to all that the land was to be built upon in any way the corporation liked, subject only to this, that there was to be a distance of twenty feet of land, which was the measure of *Daniell's* protection.

Another point was raised by Mr. *Barber*, namely, that there is no case which goes to shew that an easement can be implied where there is a piece of vacant land left between what is granted and what is retained; I am not prepared to assent to that. He has not cited any authority for it, and his argument on principle did not satisfy me at all. The case which arose in the *Curriers' Company* v. *Corbett* (2) was the converse, and I cannot see any rational foundation for the contention raised. But for the reasons I have stated, I am of opinion that the appeal must be dismissed.

BOWEN, L.J.:—

The real question which we have to consider here is the application which has been attempted to be made by Sir *Horace Davey* of the maxim that a grantor shall not derogate from his own grant, a maxim which really is as old, I will not say as the hills, but as old as the Year Books, and a great deal older. We have to apply it to the question of a house and of lights. I pause for

(1) 12 Ch. D. 31.

(2) 2 Dr. & Sm. 355.

a moment for the sake of perspicuity to observe that it is incorrect to speak of the right to light as an ordinary easement. The distinction between an affirmative easement, such as a right of way, and a negative easement, such as a right to light, or a right to support, is well-known; but still with regard to all easements or *quasi*-easements the principle will be applied in a proper case by the law that a grantor having given a thing with one hand is not to take away the means of enjoying it with the other. And this principle will be carried out by a necessary implication of whatever fiction is required to support the origin of the right not to be interfered with by the grantor. It may well be different in the case of an affirmative easement and the case of a negative easement like light. Window-light is not like a right of way: it does not begin in acts of enjoyment which are *primâ facie* an encroachment upon a neighbour's soil: it is acquired by occupancy upon one's own soil, and therefore there is no necessity to suppose that in its origin it depends upon what is strictly speaking called a grant. But it originates no doubt (when it is acquired by user) in some consent on the part of the person who has the right to obstruct the light. Some consensual origin it must have had, but a right not to have your windows obstructed, when it exists, is rather in the nature of a right that arises from an implied covenant or an express covenant than from what is strictly speaking called a grant.

But coming to the amount of enjoyment of light that is supposed by the law to accompany in an ordinary case the lease or the grant of a house which is erected with window-lights, where the grantor of the house is also the owner of premises either adjoining or neighbouring, then this presumption arises, that the grantor intends the grantee to enjoy so much light unobstructed as must under the circumstances have been assumed by both parties to be reasonably necessary for the fair and comfortable use of the premises which are the subject of the grant. That seems to me to be the real definition and measure of the ordinary implication that arises. Sir *Horace Davey* asked us to consider that the measure of this right, which in ordinary cases of a grant arose, was the same as the measure of enjoyment of ancient lights. I confess I do not at the present moment assent to that view.

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The extent of the right in the case of ancient lights is measured, not by what is assumed between the parties to be reasonably necessary, but by what has been in fact enjoyed; and although it is perfectly true that a Court of Equity will not interfere by injunction, and the common law will not interfere by giving damages, by way of relief for a nominal interruption of light which is not attended with a material diminution of convenience, still the measure of the right in the case of ancient lights seems to me to be different from the measure of the right which accompanies, in ordinary cases, a grant by a grantor.

I pause for another moment to say a word about Mr. *Barber's* argument. Mr. *Barber* argued, I think with some courage, that this doctrine that the grantor granted so much as was reasonably necessary for the complete enjoyment of the premises did not exist except where the tenement granted adjoined physically the tenement which was left in the hands of the grantor. I do not believe there is any authority for that proposition. I do not think it is founded in reason any more than upon authority; and it seems to me that it is only necessary—in order to render applicable the doctrine to which I have alluded—that the two sets of premises shall be so adjacent as that the enjoyment of one should be evidently connected with and dependent upon the state of the other. But what, after all, is the nature of this obligation when it arises between grantor and grantee? Sir *Horace Davey*, with a stroke of what I call brilliant advocacy in his reply, endeavoured to escape from the logic of the case by saying that it was an express grant after all. If he could have made that out, he would perhaps have landed his client. But the obligation which is created under such circumstances is not to my mind an express obligation at all. It is not an obligation which arises simply from the interpretation of the deed as read by the light of the circumstances outside. It is a duty that arises from the outside circumstances having regard to the relation of grantor and grantee which the deed creates. Supposing you take the deed alone, no amount of construction could evolve from the deed itself the protection which the grantee of the deed desires. It does not appear from the deed that the grantor had the power of giving the protection which is necessary for the enjoyment of that which he grants; it is only by looking outside the deed that you see that such a power of protection on the part of the grantor in favour of the grantee exists. It is only by looking outside the deed that the implication of a duty arises. I think that is the effect of the language of the House of Lords in *Caledonian Railway Company* v. *Sprot* (1). I think it is what was meant by the Master of the Rolls and by Lord Justice *Cotton* in the case of *Rigby* v. *Bennett* (2), and that view has been followed by the judgment of Mr. Justice *Chitty* in the recent case of *Beddington* v. *Atlee* (3).

Now if it is an obligation which arises from such an implication, it must be measured by all the surrounding circumstances. The presumption that arises in favour of the ordinary measure can be rebutted by shewing that the circumstances are not ordinary circumstances, or, to speak more accurately, it is not a case of rebutting a presumption, it is a question of the proper inference to be drawn from a consideration of all the facts. I do not think any hard and fast line can be laid down beyond which you are not to admit evidence to rebut the presumption, or rather—as I should prefer to say—to measure the implication itself. Here we have some salient facts which seem to me to prove to demonstration that the Plaintiffs are not entitled to the right which they claim. At the time when *Daniell* took his lease, or bargained for his lease, and erected the house, he knew perfectly well that houses were to be built on the opposite side of *Warwick Passage*. He confesses it. It did not cross his mind, as I read the evidence, that there would be any limitation upon the legal power of the corporation to build houses on the opposite side of *Warwick Passage*. He knew they were going to build there. He knew perfectly well that if they once built houses above the level of the house that was then in existence, or above the level of his own lights, there must be some interference with his lights; there was no stipulation made as to how high they were to run up the houses; and, therefore, either they were not to build at all, or there was to be some danger of his lights being interfered with. What was the protection under such

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(1) 2 Macq. 449.

(2) 21 Ch. D. 559.

(3) 35 Ch. D. 317.

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circumstances to which he looked? I think he looked to the protection of the width of the passage. That there was a negotiation about the width of the passage we know, and ultimately the width of the passage was fixed at twenty feet. That was the protection which he got; that was the measure of the right to light which went as a necessary concomitant of the position of the parties under the grant. If you do not draw the line there, I do not know where to draw it. Sir *Horace Davey* felt, I am satisfied, that difficulty himself, and fell back upon the position that he was entitled to all the lights that ancient windows would be entitled to. As I said a few minutes ago, I do not think in any view that that is a true measure of what a house would be entitled to under the doctrine that a vendor must not derogate from his own grant; but whether it is or not, it is inconsistent with the conclusion that all the parties here knew and intended that there should be buildings on the opposite side of *Warwick Passage*; and that the parties, when they negotiated for this grant, left the height of these buildings undefined. If *Daniell* had desired to protect himself further than by the width of the passage, in my opinion he ought to have done so expressly, because no implication in his favour beyond that which arises from the width of the passage seems to me to arise in this case.

I will not say what would be the case if the light had been absolutely destroyed. As the Lord Justice *Cotton* has reserved that point for consideration, I do not desire to express any opinion definitely one way or the other upon it. But that is not the case here; and in the present case I think the measure of the rights is that which I have stated.

Solicitors for the Plaintiffs: *Field, Roscoe, & Co.*, agents for *Barlow, Smith & Pinsent, Birmingham.*

Solicitors for the Defendant: *Burton, Yeates, & Co.*, agents for *W. S. Allen & Edge, Birmingham.*

M. W.

In re THOMPSON.
STEVENS *v.* THOMPSON.

[1886 T. 1857.]

Practice—Married Woman suing by Next Friend—Security for Costs.

A married woman by her next friend took out an originating summons for administration of a testator's estate, upon which an order was made without prejudice to any application by the Defendants as to security for costs. The Defendants applied, and, on the ground that the next friend was not a person of substance, an order was made staying proceedings till the Plaintiff had given security for costs. The Plaintiff appealed on the ground that a married woman could not be ordered to find security for costs:—

Held, that although a married woman suing alone cannot be ordered to find security for costs on the ground of poverty, security had rightly been ordered in the present case, since the next friend alone was liable for them, and that the Plaintiff after obtaining a judgment by her next friend was too late to claim to sue alone.

MRS. *STEVENS*, a married woman who was entitled under the will of her father, who died in 1860, to a life interest in one-sixth of his residuary estate, took out in 1886, an originating summons, by *William Robertson* her next friend, for the administration of the testator's real and personal estate. The summons was adjourned into Court, and on the 9th of June, 1887, Mr. Justice *Stirling* directed (1) an inquiry what amount was due to the testator at his death from the firm of which he had been a member, and (2), an inquiry under what circumstances a certain mortgage had been retained by the executors, and under what circumstances two specified sums were paid or applied in respect thereof. Further consideration was adjourned without prejudice to the Defendants being at liberty to apply as to security for costs.

On the 5th of March, 1888, the Defendants applied for security for costs on the ground that *Robertson*, the next friend, was in poor circumstances, and an order was made by Mr. Justice *Stirling* in Chambers, that the Plaintiff should procure some sufficient person on her behalf to give security to the Defendants by bond in the penalty of £50, conditioned to answer costs if ordered to be

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paid by the Plaintiff, or to pay into Court £50, and in the meantime proceedings were stayed.

The Plaintiff appealed from this order, her next friend not being named in the notice of appeal.

MacClymont, for the Appellant:

I submit that there is no jurisdiction to order a *feme covert* to find security for costs. She is now under the *Married Women's Property Act*, 1882, in the same position as any other litigant, and cannot be ordered to give security because she is poor: *In re Isaac* (1). In that case there was no next friend. In the present case there is a next friend, but that makes no difference: *Martano* v. *Mann* (2); *Severance* v. *Civil Service Supply Association* (3); the next friend would be struck out if an application for that purpose was made. In *Martano* v. *Mann* the *feme covert* did not stand in so good a position as here, for in the present case an order has been made on the summons, so that the Plaintiff is, *primâ facie*, in the right.

Methold, *contrà*.

COTTON, L.J.:—

I am of opinion that this is a case in which security for costs ought to be given. As the married woman is suing by her next friend, perhaps the order ought to have been that the next friend should give security, but that objection is not taken before us. We have decided that if a married woman sues alone she cannot be ordered to give security for costs on the ground of poverty, but in the present case the Plaintiff is not suing alone, she sues by her next friend. Now when a married woman sues by a next friend the next friend alone is liable for costs, and though she may have separate property as to which she is not restrained from anticipation, it cannot be made liable. I give no opinion on the question whether, where a married woman who could sue alone sues by a next friend, a decree ought to be made. She chose that form of suit, she did not apply to amend her

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(1) 30 Ch. D. 418.

(2) 14 Ch. D. 419.

(3) 48 L. T. (N.S.) 485.

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summons, and after she has obtained an order by her next friend it is too late for her to say that she ought to be at liberty to proceed without one. The next friend not being a person of substance, I am of opinion that security for costs was rightly ordered.

Fry and Lopes, L.JJ., concurred.

Solicitors for Plaintiff: *Belfrage & Co.*
Solicitors for Defendants: *Hickin & Fox.*

H. C. J.

In re STOCKEN.
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[1887 S. 323.]

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March 26.
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Practice—Administration Order—Discretion of Court—Direction by Testator that his Executors shall commence Administration Action—Rules of Supreme Court, 1883, *Order* LV., *r.* 10.

A direction by a testator that his executors shall take proceedings to have his estate administered by the Court, does not deprive the Court of its discretion to refuse to make an order for administration; but weight ought to be given to such a direction in considering whether the order shall be made.

Where such a direction had been given, an order was made in Chambers, on the application of one of the executors, more than a year after the death of the testator, declaring that the estate ought to be administered by the Court, and directing an inquiry of what the estate then consisted. The Defendants (the other executor and a party beneficially interested) moved to discharge this order, on the ground that an order for administration was unnecessary, and would cause great and useless expense. *North*, J., refused to discharge the order, and his decision was affirmed by the Court of Appeal, who expressed their approval of the limited form in which the order was made.

Motion to discharge an order made in Chambers upon an originating summons for the administration of the estate of *Frederick Stocken*, deceased.

Frederick Stocken, by his will dated the 9th of November, 1881, appointed *T. R. Jones* and his (the testator's) daughter, *Elizabeth M. M. Hawkins* (a widow) executor and executrix, and trustees of

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his will. And, after bequeathing specific and pecuniary legacies and annuities, including a bequest of £200 a year to each of his three grandchildren (the children of Mrs. *Hawkins*) during the joint lives of Mrs. *Hawkins* and each respective grandchild, he directed his trustees to pay the residue of the income of his estate to Mrs. *Hawkins* during her life, for her separate use without power of anticipation, and after her death to hold the trust funds on trust for the three grandchildren and their issue as therein mentioned. At the end of the testator's will was the following clause: "I direct my said trustees or trustee within two calendar months after my death to commence an action in the Chancery Division of the High Court of Justice for the administration of my real and personal estate; but, notwithstanding the foregoing direction and the institution of any action, I authorize my said trustees or trustee to pay the several pecuniary legacies hereinbefore or by any codicil hereto given, as and when they, or he, or she, shall think fit; and to realize my said business as and when they, or he, or she, shall think fit, without being liable for any loss that may be occasioned by means of such payment or sale being made otherwise than under the direction of the Court."

The testator died on the 3rd of November, 1886. On the 22nd of January, 1887, *T. R. Jones* and Mrs. *Hawkins* took out an originating summons against one of the children of Mrs. *Hawkins* as Defendant, asking for the direction of the Court under Order LV., rule 3 (*e*), whether the Plaintiffs were bound to commence an administration action, and, if they were so bound, then to have the estate of the testator administered by and under the direction of the Court. This summons was subsequently amended by making Mrs. *Hawkins* a Defendant instead of a Plaintiff.

On the 27th of February, 1888, an order was made in Chambers to the following effect. Declare that the estate of the testator ought to be administered under the direction of the Court, and order the same accordingly. Direct an inquiry "of what the property now subject to the trusts of the will consists." And the Plaintiff, by his solicitors, desiring that the leaseholds belonging to the testator's estate should be converted, it was ordered that the trustees should be at liberty to lay proposals before the

Judge for such conversion, and should be at liberty to apply to the Court for such further accounts and inquiries as might be deemed necessary, and also to apply to the Judge in Chambers on the answer to the above inquiry being certified, and generally as they might be advised.

The Defendants moved that this order might be discharged, and that instead thereof the Court might declare that the trustees were not bound to commence an administration action.

The motion was heard before Mr. Justice *North* on the 26th of March, 1888.

Herbert Lake, for the Defendants:—

The direction of the testator to the trustees to commence an administration action is not imperative. At any rate it is not obligatory on the Court. The Court will deal with the case just as if there were no such direction in the will.

Having regard to the large discretion given by the testator to the trustees, an administration order is entirely unnecessary.

C. T. Simpson, for the Plaintiff:—

I submit the matter to the Court. The direction in the will is imperative in its terms.

NORTH, J.:—

I am quite satisfied that the order which I made in Chambers is right. Under the old practice great expense was caused by the necessity of obtaining a full decree in an administration action, where there were really only one or two minor points which required judicial decision. The object of rule 10 of Order LV. was to put an end to this crying evil, and it gives the Judge a discretion to make either a full administration order, or what I may call a partial administration order. In the present case the testator's direction to his trustees to commence an administration action is clear. It has been argued that he cannot have intended this direction to be imperative, having regard to the wide discretion which he has given to the trustees by the words which follow. I think it is clear that, notwithstanding that direction, he did intend that an administration decree

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should be made. I was told that the Defendants objected to the infant beneficiaries being made wards of Court. But it seems to me that in all probability that is the precise thing which the testator intended as the effect of an administration decree. Looking at the fact that he did not intend to control the discretion of his trustees and executors as to some matters, I cannot but think that, for some reasons of his own, he did desire that the infants should become wards of Court. Under these circumstances, I think that it was the duty of the trustees to comply with his direction, and I think I am bound to give effect to it in some way. But at the same time I ought to limit the expense as much as is possible. I do not think that the making of an administration order necessarily involves going through all the details of an administration suit. It ought to be reduced to the smallest possible limits. The inquiry of what the property now subject to the trusts of the will consists is a proper one to direct. It will cause very little expense; an affidavit by the executors will be sufficient, unless their affidavit should involve further inquiries. When infants are to be wards of Court, it is right that the Court should have before it some information of what the property in which they are interested consists. The other inquiry, which in Chambers I was requested to direct, stands in a different position. The testator intended that his trustees should have some discretion as to the realization of his estate, and, if the trustees are now both agreed that such an inquiry is not at present required, I am quite willing either to omit it, or to direct that it shall not be prosecuted until further order. But, in making an order for the administration of the estate, I am doing simply that which the testator intended, and I think I am bound to do it for the purpose of making the infants wards of Court. Subject to that, I will take care to limit the expense as much as possible.

W. L. C.

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The Defendants appealed from this decision, and the appeal was heard on the 18th of April, 1888.

Ince, Q.C., and *Herbert Lake*, for the appeal:—

The Court has, under Order LV., r. 10, a discretion to refuse to make an administration order, and this discretion cannot be taken away by any direction given by a testator. There is no suggestion of anything which makes an administration order desirable. Mr. Justice *North* thought that the testator intended his grandchildren to be wards of Court, but the expenses of their being so will in the long run be very heavy, and it is most desirable to avoid them. If this decision is upheld, it will make it a common form in wills to direct proceedings to be taken to administer the estate in Court.

C. T. Simpson, contrà, was not called upon.

COTTON, L.J.:—

This is an appeal from an order made on an originating summons for administering the estate of the testator, but limiting the administration so that no unnecessary expense should be caused. The only direction given, after the general direction that the estate be administered, is the directing an inquiry of what the estate consists. In my opinion we ought not to interfere with that order. Undoubtedly the direction contained in the will of the testator does not make it imperative on the Court to make an order for administration. But in my opinion such a direction ought to be considered by a Judge when an originating summons for administration comes before him. I think it was the duty of the trustees, having regard to that direction, to commence proceedings for administering the estate in the Chancery Division, and I should say that the testator did not mean only that proceedings should be originated, but that the executors should, if they could, get a decree for administration.

Then that being so, can we say that the order under appeal was wrong? It is true that the Court has a discretion not to grant a decree unless the circumstances of the case are such as to make it desirable. Here the testator directs that proceedings shall be taken for administering the estate in the Court of Chancery, and he must be supposed to have intended all the consequences of an administration. It may have been that he desired that the amount of his estate should be definitely ascertained and fixed, not merely by the account of the executors, but

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by some judicial proceedings, or he may have thought it right to obtain for his granddaughters the protection afforded to wards of Court. I think, therefore, that it was not wrong in the learned Judge to make such a limited administration decree as he has done, which will answer both the purposes which have been suggested as probably present to the testator's mind. We cannot differ from the learned Judge in the Court below.

FRY, L.J.:—

I am of the same opinion, and only desire to make one observation, and that is with regard to the remark which was made, that the result of this decision will be to make the introduction of a clause of this sort a common practice. If any person, without express authority or direction from a testator, introduces any such clause into a will, all I can say is that he will be guilty of a grave dereliction of duty.

LOPES, L.J.:—

I entirely agree, and I only wish to add this, that in my opinion the wish of the testator himself cannot make it imperative upon the Court to make an administration order, but considerable weight ought to be given to his expression of such a wish.

Solicitors: *Lake, Beaumont, & Lake; Joseph Plaskitt.*

H. C. J.

UNION ELECTRICAL POWER AND LIGHT COMPANY *v.* ELECTRICAL STORAGE COMPANY.

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1887.
NORTH, J.
Nov. 25.
C. A.
1888.
April 18.

[1887 U. 443.]

Patents, Designs, and Trade Marks Act, 1883 (46 *&* 47 *Vict. c.* 57), *s.* 32—*Objections to Patent—Particulars of Objection—Discovery.*

The Plaintiffs brought an action to restrain the Defendants, who were holders of various patents for electric accumulators, from threatening the Plaintiffs' customers with legal proceedings for infringement, and by their statement of claim alleged that the Defendants' patents were invalid. No specific statement had been made by the Defendants which patents they alleged to be infringed. The Defendants, who had not delivered a defence, applied for particulars of objections. *North*, J., ordered the Plaintiffs to deliver particulars of objections within a limited time after the Defendants had given to the Plaintiffs a list of the patents on which the Defendants intended to rely. The Defendants appealed, asking for an unconditional order on the Plaintiffs to deliver objections:—

Held, that the order under appeal was right, but that the Defendants ought also to state that they relied on no other patents than those in the list, and that the Plaintiffs ought to undertake, when the list had been delivered, to amend their statement of claim so as to define the patents the validity of which they disputed.

THIS was an action brought under the 32nd section of the *Patents, Designs, and Trade Marks Act*, 1883, to restrain the Defendant company from threatening the Plaintiffs' customers or others with legal proceedings in respect of electrical batteries manufactured by the Plaintiff company.

The statement of claim alleged that the Plaintiff company were incorporated in December, 1886, and were advertised in the *Standard* newspaper as owners of letters patent for the construction of secondary batteries or accumulators of electricity; and that the Defendant company caused to be inserted in a number of the *Standard* immediately below the Plaintiffs' advertisement the following advertisement:—

"Secondary Batteries.—Notice.—The *Electrical Power Storage Company, Limited*, of 4, *Great Winchester Street, London, E.C.*, owns the letters patent granted to *Faure*, *Sellon*, *Swan*, and others, for the construction of secondary batteries or electrical accumulators.

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"The batteries manufactured by this company, and known as the *E. P. S.*, are now supplied to all the chief firms and companies who undertake electric light installations, and are recognised as being the only reliable, durable, and economical form of electrical accumulator.

"Under the patents owned by this company is claimed (amongst other points) the employment of spongy metallic lead and of salts or oxides of lead, or admixtures thereof, in whatever way produced, or in whatever way attached to metallic connections, plates, girds, supports, or conductors, or packed in, or between, or connected with, or in any way applied to, any form of metallic lead, and the employment of perforated, interstical, corrugated, grooved, roughened, cellular, or indented, lead plates or attachments of whatever shape, for such purposes; as also the use of non-oxidizable frames, supports, or edgings, with or without conductors of platinum or other metal, for solid peroxide or spongy metallic plates.

"Notice is hereby given that every manufacturer or individual user of any secondary batteries of such construction or form without license from the *Electrical Power Storage Company, Limited*, renders himself responsible for such unlawful manufacture or use, and all the consequences thereof."

The statement of claim also alleged (par. 3):—

"Each and all of the letters patent granted for the construction of secondary batteries or accumulators of electricity, or for improvements therein, to *Faure*, *Swan*, and *Sellon*, or any other patentee who had at that time assigned his letters patent to the Defendant company, were invalid, and, as the Defendants well knew, of no force and effect." The claim went on to state that the Defendant company had threatened individuals, firms, and companies, and prevented their purchasing the Plaintiffs' apparatus. As an instance, the Plaintiffs stated a letter sent by the Defendants in June, 1887, to a firm in *London*, who were customers of the Plaintiffs, as follows: "My directors, hearing that you have the order for lighting the new bank in *Lombard Street*, for *Lloyds, Barnetts, & Bosanquets, Limited*, and that Mr. *Lea*, of *Birmingham*, is trying to influence the acceptance of a company called the '*Union*,' we think it only right to let you know that when that company was attempted to be floated, we served its directors with a notice that their batteries were an infringement of patents held by the *Electrical Power Storage Company, Limited.* If therefore the '*Union*' company should effect the installation for electric light for the new bank, we should be compelled to apply for an injunction, and it would be very much against the wish of this company to interfere in any way with work done for you."

The Plaintiffs claimed an injunction to restrain the Defendants from threatening any customers of the Plaintiffs, or any other person, with legal proceedings in respect of any manufacture, use, sale, exhibition, or offering for sale or purchase of electrical batteries manufactured by the Plaintiffs, constructed in the manner alleged by the Defendants to be an infringement of the letters patent mentioned in the above advertisement.

The Defendants applied *inter alia* for particulars of objections to their letters patent, and the Chief Clerk of Mr. Justice *North* made an order as follows: "Upon the Defendants giving to the Plaintiffs on oath a list of letters patent upon which they intend to rely, it is ordered that the Plaintiffs do, within three weeks after the giving of such list of letters patent as aforesaid, deliver to the Defendants particulars in writing of the objections which the Plaintiffs propose to make at the trial of this action to the validity of the letters patent to appear in such list as aforesaid." The time for delivering defence was extended to ten days after the delivery of particulars by the Plaintiffs.

The Defendants gave notice of motion before Mr. Justice *North*, that the portion of the order which is set out above verbatim might be discharged, and that the Plaintiffs might be ordered within three weeks to deliver to the Defendants particulars in writing of the objections which the Plaintiffs proposed to make at the trial of the action to the validity of the letters patent in respect of which the threats were in the statement of claim alleged to have been made.

The motion was heard before Mr. Justice *North* on the 25th of November, 1887.

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J. C. Graham, for the Defendants:—

The Plaintiffs complain of a libel: it is for them to say how they are hurt, they have to make out their case; they impeach the Defendants' patents, and it is for them to specify which patents they intend to impeach; it will be in issue in respect of what patents the threats were made. It might be treated as an admission by the Defendants that threats have been made in respect of the specified patents.

Roger W. Wallace, for the Plaintiffs:—

The Defendants have made threats in respect of undefined patents. The Plaintiffs are entitled to discovery of which those patents are, and that discovery is necessary before they can give the particulars of objections required of them: *Wren* v. *Weild* (1).

Graham, in reply.

NORTH, J.:—

I think the order made in Chambers is right. I am glad to find there is a case *Wren* v. *Weild*, not mentioned to me in Chambers, so near the present. I think the order must stand subject to this, that the statement to be made by the Defendants is not to be treated as an admission that threats have been made in respect of the specified patents; and there is no reason why the statement should be on oath.

The order was accordingly varied by omitting the words "on oath," and in other respects was affirmed.

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The Defendants gave a notice of appeal to the same effect as the notice of motion before Mr. Justice *North*, and the appeal was heard on the 18th of April, 1888.

Moulton, Q.C., and *J. C. Graham*, for the Appellants:—

The Plaintiffs do not by their statement of claim allege that their batteries are not infringements if the Defendants' patents are valid. It is a matter of course that particulars of objections should be given, as the Plaintiffs dispute some of our patents. We do not admit that any of our patents are invalid, and the Plaintiffs ought to shew which of them they seek to impeach. They are complaining of a libel, and the burden of proof is on them.

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(1) Law Rep. 4 Q. B. 213.

Roger W. Wallace, for the Plaintiffs:—

[COTTON, L.J.:—Do you object to amending the 3rd paragraph of the statement of claim, when the Defendants have stated on what patents they rely, so as to shew which particular patents you allege to be invalid?]

We are ready to undertake to do so. The allegations in the advertisement and in the Defendants' letter were so vague that it was impossible to frame paragraph 3 more definitely.

[He was not further called upon.]

COTTON, L.J.:—

This is an appeal by the Defendants from an order of Mr. Justice *North*. The action is brought under sect. 32 of the *Patents, Designs, and Trade Marks Act*, 1883. The Plaintiffs say: "We have started a business and the Defendants threaten those who deal with us with legal proceedings, on the ground that we are infringing the Defendants' patents. We say that the Defendants have no rights under those patents, for they are invalid." The Defendants apply for particulars of objections to the patents. The Judge has said: "I should like first to know on what patents you rely as justifying your advertisements and threats." That seems to me to be right. Let the Defendants say by what patents they justify their threats, and the Plaintiffs then will confine their objections to those patents or some of them. The Defendants' advertisement and letter are framed in a vague way, so as to justify the vagueness of the 3rd paragraph of the statement of claim. Mr. *Moulton* said he should be put in great difficulty, for that if the objections applied to all the Defendants' patents he would have to put in a defence putting the validity of them all in issue. That is not what the Plaintiffs wish, and they are willing, when the Defendants have stated on

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what patents they rely, to alter the statement of claim so as to put in issue the validity of those patents only. The Defendants ought to state not only on which patents they rely, but that they rely on no others. The appeal will therefore be dismissed, the Plaintiffs giving an undertaking to amend in the way I have mentioned; but as this was not asked for below it will make no difference as to the costs of the appeal.

FRY and LOPES, L.JJ., concurred.

Solicitors for Plaintiffs: *Linklater, Hackwood, Addison, & Brown.*
Solicitors for Defendants: *Renshaws.*

H. C. J.

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April 25.

MARSHALL *v.* MARSHALL.

Practice—Service out of the Jurisdiction—Injunction.

A summons by *T. A. M.*, a manufacturer, resident in *Scotland*, for leave to register a trade-mark, was pending before *North*, J., and was opposed by *J. M.*, also resident and carrying on a similar manufacture in *Scotland*, on the ground that the mark was similar to one belonging to *J. M.* *J. M.* applied for leave to issue a writ against *T. A. M.* for an injunction and damages, on the ground that *T. A. M.* was selling his goods in *England* in such a way as to lead the public to believe that they were *J. M.'s* goods. *J. M.* deposed that the same witnesses would be required on the summons and in the action, and that it would be most convenient and would save great expense if the action was brought in *England*, or that the summons and action could be tried together:—

Held (affirming the decision of *North*, J.), that as an injunction in *England* could only be enforced against agents of *T. A. M.*, and not against himself, leave ought not to be given to issue the writ, the matter being one which was better left to the Courts of *Scotland*.

THIS was an application by *James Marshall*, of *Glasgow* (hereinafter called the Plaintiff) for leave to issue and serve a writ out of the jurisdiction in an action intended to be brought by him against *Thomas Alexander Marshall*, of *Glasgow* (hereinafter called the Defendant). The Plaintiff deposed that in 1885 he established a business as packer and merchant of semolina and other preparations of wheat. That in the same year he took the Defendant into partnership, and the business was carried on by them at

Glasgow. That in 1885 the firm registered two trade-marks, and in 1886 a third. That the firm became bankrupt in February, 1887, and ultimately the trustee in bankruptcy sold the goodwill and trade-marks to the Plaintiff. That on the 28th of March, 1887, the Defendant applied to register a trade-mark for preparations of wheat, and in October, 1887, the Plaintiff filed a notice of opposition. That a summons had been taken out before *North*, J., for leave to register the trade-mark, and the Plaintiff was advised that it would be necessary to obtain the evidence of expert witnesses in *England* to prove the similarity of this trade-mark to the old trade-mark of the firm. That the Defendant was selling in *England* semolina packed in wrappers and placed in boxes almost identical with those used by the Plaintiff, and in such a manner offering his goods to the public as to deceive them into the belief that they were buying the Plaintiff's goods. That the Plaintiff was extending his business to *England* for the sale of semolina so packed as aforesaid, and that the same had an increasing sale and reputation. That the Plaintiff was advised that he was entitled to maintain an action in *England* against the Defendant for an injunction and damages, and was desirous of calling as witnesses the same persons as would give evidence on the hearing of the summons. That it would be very expensive and inconvenient to take those witnesses to *Scotland* to give evidence there. That the Plaintiff was advised that the hearing of the summons and the trial of the action could most conveniently be had at the same time, so as to make use of the same evidence in both proceedings.

Mr. Justice *North* refused the application, which was thereupon renewed before the Court of Appeal on the 25th of April, 1888.

Chadwyck Healey, for the application.

COTTON, L.J.:—

If an injunction were granted by an English Court that Court could not enforce it against the defendant himself, but only against his servants and agents in *England*, who are not the persons primarily responsible. On the other hand, a Scotch Court could enforce its orders against the defendant himself, and this

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being so, I think that there is no sufficient reason for withdrawing the case from the Scotch Courts. The application will therefore be refused.

FRY, L.J., concurred.

Solicitor: *Salaman.*

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April 27.

ELLINGTON *v.* CLARK, BUNNETT, & Co.

[1886 E. 1127.]

Shorthand Notes of Evidence—Judge's Notes.

When oral evidence taken in the Court below has to be considered on appeal, it is the duty of the Appellant to apply to one of the Judges of the Court of Appeal through his clerk to ask the Judge before whom the evidence was taken to send to the Court of Appeal a copy of the Judge's notes, and if this is not done the appeal will be ordered to stand over at the expense of the Appellant.

The Court of Appeal will not allow a shorthand note of evidence taken by a clerk of one of the solicitors in the action to be referred to.

IN this case shorthand notes taken by clerks of the solicitors in the action of the evidence in the Court below were referred to on the appeal. A copy of the Judge's notes had not been asked for, but their Lordships had the original in Court.

COTTON, L.J.:—

We wish it to be understood that hereafter we shall not allow shorthand notes of evidence taken by a clerk of one of the solicitors in the action to be in any way referred to. Such notes are not to be relied upon. I do not suppose that the clerk would be guilty of intentional dishonesty, but it is impossible for him to help being unconsciously biassed by his wish that the evidence should turn out in a particular way. A note by a professional shorthand writer, who is independent, stands in a different position. It is the duty of the Appellant to apply to one of the Judges of the Court of Appeal through his clerk to ask the Judge from whom the appeal is to send a copy of his notes to the Court of Appeal. It is to be understood that in future, when the Appellant has not so applied for a copy of the Judge's notes, we shall order the appeal to stand over to allow of the application being made. The Lord Justice *Fry* suggests, and I agree, that this standing over should be at the expense of the Appellant if he has not previously made the application.

Fry and Lopes, L.JJ., concurred.

Counsel for Plaintiffs: Sir *R. Webster*, A.G.; *Moulton*, Q.C.; and *Micklem.*

Counsel for Defendants: *Rigby*, Q.C., and *T. Terrell.*

Solicitors for Plaintiffs: *Leonard & Leonard.*

Solicitors for Defendants: *Wetherfield, Son, & Baines.*

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Jan. 17, 18.

HATTEN *v.* RUSSELL.

[1886 H. 4240.]

Vendor and Purchaser—Contract—Conditions of Sale—Completion, Date of—Interest, Payment of—Time of Essence of Contract—Requisitions—Defect of Title or Conveyance—Repudiation—Specific Performance—Tenant for Life—Power of Sale—Trustees of Settlement—Notice—Settled Land Acts, 1882 *and* 1884.

Where a contract for sale between a vendor and purchaser fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser immediately to repudiate the contract if, in consequence of a defect of conveyance merely and not of title, the vendor is unable on his part to complete the contract on the day fixed. Where the defect is simply one of conveyance and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed by the contract for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so.

Except in a case mentioned in sect. 15, a tenant for life has, under the *Settled Land Act*, 1882, an absolute power of selling the settled land without the consent or control of the trustees of the settlement, unless they have reason to believe that any intended exercise of the power is improper, in which case they may apply to the Court for directions under sect. 44. Consequently, neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement under the Act, nor, when there are any, the fact that no notice has been given them by the tenant for life, under sect. 45, sub-sect. 1, of his intention to proceed to a sale, prevents his making a statutory title. It is sufficient for the protection of the purchaser if by the time he comes to complete there are trustees under the Act to whom he may pay his purchase-money if required so to do by the tenant for life under sect. 22, and notice has been given them under sect. 45, sub-sect. 1; though, under sub-sect. 3, a purchaser dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice: but, *quære*, whether a purchaser incurs liability by completing his purchase with actual knowledge that no notice has been given.

The relative position and powers of a tenant for life and the trustees of a settlement under the *Settled Land Acts*, 1882 and 1884, considered.

MRS. *CURTEIS*, widow, deceased, by her will, dated in 1861, devised all her real estate, which included three freehold cottages at *Stone*, in *Kent*, to trustees, as to one moiety thereof to the use of her son, the Defendant, *Robert Bassett Curteis*, in fee simple, and as to the other moiety thereof to the use of the trustees in fee upon trust to pay to or permit her said son to have the yearly rents for his life, with remainders over.

The will contained no powers of sale or otherwise, except a power to appoint new trustees.

On the 28th of July, 1886, one *Dann*, an auctioneer, upon the instructions of the Defendant, *R. B. Curteis*, put up the entirety of the cottages for sale by auction as Lot 5 in the printed particulars of sale and subject to certain conditions, which, after requiring that each purchaser should pay a deposit of 10 per cent. on his purchase-money and sign an agreement, provided as follows (condition 3): "The remainder of the purchase-money of each lot shall be paid, and the purchase thereof shall be completed on the 29th of September next (1886) at the offices of the vendors' solicitors (naming them); and if from any cause whatever the purchase of any lot shall not be completed on that day, the purchaser thereof shall pay to the vendors interest after the rate of £5 per cent. per annum on the remainder of the purchase-money from that day until the completion of the purchase." Condition 7 provided that: "all objections and requisitions in respect of title or the abstract or particulars, or anything appearing therein respectively, shall be stated in writing and sent to the vendors' solicitors within fourteen days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be of the essence of the contract. If any objection or requisition shall be made and insisted on which the vendors shall be unable or unwilling to remove or comply with, the vendors shall be at liberty (notwithstanding any intermediate negotiation in respect thereof, or attempts to remove or comply with the same) by notice in writing to the purchaser by whom such objection or requisition shall be made, to rescind the sale, in which case the purchaser shall receive back the deposit without interest or costs, but the purchaser may, within seven days after receiving the notice to rescind, withdraw the objection or requisition, in which case the notice to rescind shall be deemed to be withdrawn also."

At the sale, Lot 5 was knocked down to the Plaintiff for £565, and he thereupon paid to *Dann*, the auctioneer, £56 5*s*., by way of deposit, and signed a purchase contract.

The receipt for the deposit purported to be signed by *Dann* as agent for "the vendors," the trustees of the will (naming them), and *Curteis*.

On the 29th of July, 1886, being the day following the sale, the trustees received from the Defendant *Curteis* notice in writing of his "intention to sell that moiety of the three cottages of which he was tenant for life."

On the 12th of August, 1886, the Defendant *Curteis* delivered his abstract of title to the Plaintiff, and on the 25th of August the Plaintiff's solicitor wrote to the Defendant's solicitors: "It does not appear from the abstract that there are any trustees of the will of Mrs. *Curteis* within the meaning of the *Settled Land Act*, 1882. It further appears that the notice required by that Act was not given until after the contract for sale was signed."

On the 21st of September the Defendant *Curteis's* solicitors replied insisting that the trustees of the will were trustees within the meaning of the Act.

On the 2nd of October the Plaintiff's solicitor again wrote that he was advised there were no trustees within the meaning of the Act.

On the 6th of October the Defendant's solicitors, having been in the meantime advised that their contention was erroneous, took out a summons in the Chancery Division for the appointment of trustees of the will for the purposes of the *Settled Land Acts*, 1882 and 1884, and gave notice to the Plaintiff's solicitor of their having done so.

The next day, the 7th of October, the Plaintiff's solicitor wrote that the intended application to the Court would not remove his objections to the title, and that, in his opinion, the contract should be considered at an end, and he asked for the return of the the deposit. On the 8th of October he wrote again: "As a good title has not been shewn, and the day for completion has passed, the purchase is at an end." The Defendant's solicitors replied, declining to accept that view, and pointing out that to meet the Plaintiff's objection, they had made an application for the appointment of trustees under the Acts.

On the 11th of October the Plaintiff's solicitor wrote: "Neither at the date of the contract, nor on the day fixed for completion, nor since, had the proposed vendor the right or power to sell under statute, or otherwise, and I must decline to wait while he obtains such right or power."

On the 29th of October, 1886, an order was made on the summons appointing *Alfred* and *Henry Russell*, the then trustees of the will of Mrs. *Curteis*, "trustees of the settlement for the purposes of the *Settled Land Acts*, 1882 and 1884." On the same day, the trustees, in writing, waived notice of the sale by the Defendant *Curteis* of the moiety of the cottages, and *Curteis's* solicitors gave the Plaintiff notice of the order and waiver, and that he, *Curteis*, was ready to complete.

Thereupon, the Plaintiff, on the 3rd of November, 1886, issued the writ in this action against the trustees, *Curteis*, and *Dann*, the auctioneer, claiming a declaration that he was not under any liability to purchase Lot 5, the return of his deposit, and damages.

In his statement of claim the Plaintiff alleged, as his grounds of action, that the will of Mrs. *Curteis* contained no power of sale of the moiety of which the Defendant *Curteis* was tenant for life, and that neither at the date of the auction nor on the 29th of September, 1886, the day fixed for completion, nor at the time of the Plaintiff declining to proceed with the purchase, were there any trustees for the purpose of the *Settled Land Acts* of the settlement created by the will of Mrs. *Curteis*, and accordingly that the Defendant *Curteis* had no title to sell or convey, or to contract to sell, the settled moiety of Lot 5.

In his defence, the Defendant *Curteis* insisted that there was no provision in the contract or conditions of sale making time of the essence of the contract as far as related to the date fixed for completion, and that no notice had at any time been given by the Plaintiff making time of the essence of the contract; and he stated that ever since the date of the order of the 29th of October, 1886, he had been ready and willing to complete the purchase. He accordingly counter-claimed for specific performance of the contract of the 28th of July, 1886, and for payment of one moiety of the purchase-money to the trustees and of the other moiety to himself.

The trustees in their defence stated that they never employed the Defendant *Dann* to sell the property, or any part thereof, nor gave him any instructions whatever in the matter, and that they were in no way concerned in the question in the action. Thereupon the Plaintiff gave notice discontinuing the action as against them, and they were accordingly dismissed from the action.

In his reply the Plaintiff joined issue on the Defendant *Curteis's* defence, and the action now came on for trial.

Renshaw, Q.C., and *Dauney*, for the Plaintiff:—

It is well-settled law that, as soon as the purchaser discovers that the vendor cannot make a good title, he may repudiate the contract and is not bound to wait until the vendor can make a title: *Hoggart* v. *Scott* (1); *Forrer* v. *Nash* (2); *Brewer* v. *Broadwood* (3); *Wylson* v. *Dunn* (4). Here the vendor, as regards the moiety of which he is tenant for life, has not conformed to the requirements of the *Settled Land Act*, 1882, so as to enable him to sell. By sect. 45, a tenant for life intending to sell is required to give not less than one month's notice of his intention to the "trustees of the settlement." Here no notice was given until after the sale, and then not to the proper trustees; for as the then trustees of the will were mere devisees having no power of sale, there were no "trustees of the settlement" for the purposes of the Act within the definition in sect. 2, sub-sect. 8. It was therefore necessary, in order to enable the tenant for life to make a title, to have trustees appointed under the Act; but this was not done until the 29th of October, long after the time fixed for completion had passed. The notice of waiver by the newly appointed trustees under sect. 5 of the *Settled Land Act*, 1884, was too late. Sect. 45 of the principal Act makes it a condition precedent to the exercise by a tenant for life of his power of sale under the Act that he should give notice to the "trustees of the settlement;" or, at least, he should do so before the day fixed for completion: *Duke of Marlborough* v. *Sartoris* (5). It is absolutely necessary that when a tenant for life proceeds to exercise his powers under the Act there should be "trustees of the settlement," for under sect. 22 they are the persons to receive the purchase or capital moneys for investment, unless the tenant for life desires that they shall be paid into Court.

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(1) 1 Russ. & My. 293.

(2) 35 Beav. 167.

(3) 22 Ch. D. 105.

(4) 34 Ch. D. 569.

(5) 32 Ch. D. 616.

Here there was no one to whom we could pay our purchase-money. We could not proceed with the purchase in the face of distinct notice that there were no trustees under the Act. The case is analogous to that of a purchaser under a power of sale in a mortgage deed who knows that a provision in the mortgage deed, requiring three months' notice to be given to the mortgagor before the exercise of the power of sale, has not been complied with. In *Parkinson* v. *Hanbury* (1) it was held that, in such a case, if the purchaser knew that the notice had not been given, he could not sustain his purchase.

[KAY, J.:—In that case the power did not arise until the notice had been given; but here, is it not the scheme of the Act that the tenant for life shall have absolute power to sell, though as between himself and the trustees he has certain duties to perform?]

He was not in a position to complete when the appointed day arrived, and we were therefore entitled to repudiate. When he was at last able to make a good title the contract was at an end, and he cannot now set it up.

[KAY, J.:—The first question is, Is this an objection to the title or to the conveyance: Secondly, if it is an objection to the conveyance, is it not an objection which the vendor can remove at any time?]

Our objection is to the title of the tenant for life to sell without trustees being first appointed under the Act.

[KAY, J.:—I cannot find that the statute imposes any condition that, as between the vendor tenant for life and the purchaser, trustees shall be appointed.]

By sect. 33, the tenant for life is made a trustee for himself and the remaindermen: he is thus in the position of a trustee coming to sell; and if he does so without trustees having been appointed under the Act, the purchaser having notice that none have been appointed, he, the tenant for life, is a trustee selling in breach of trust, and consequently he cannot enforce the contract against the purchaser, nor can the purchaser against him. Although it is no doubt the intention of the Act to give the tenant for life power to sell, it is equally its intention to guard the interests of the remaindermen. Sect. 44 shews that the object of appointing "trustees of the settlement" is that the interests of all parties entitled under the settlement may be looked after; and it is the special duty of the trustees to see that the tenant for life exercises his power properly.

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(1) 1 Dr. & Sm. 143.

[KAY, J.:—The Act does not say that the trustees shall exercise a supervision over the tenant for life.]

They are trustees appointed with reference to and for the purposes of the sale. The only reason for the presence of trustees is that they may be informed by the tenant for life of the circumstances of the sale; and if he fails to inform them, it is their duty to inquire into them. We submit it is clear from the Act that a tenant for life cannot sell, make a title, and execute a proper conveyance where there are no trustees for the purposes of the Act. If the purchaser has notice that there are no trustees, he must know that the notice required by sect. 45 for the protection of the remaindermen has not been given: in fact he is cognisant of a breach of trust on the part of the tenant for life, and is not protected by sub-sect. 3. Again, there was want of mutuality in the contract, for the tenant for life could not make a title without the appointment of trustees, and the purchaser could not compel him to do so.

[KAY, J., referred to *Ellis* v. *Rogers* (1) on the question of a purchaser's right to repudiate.]

Millar, Q.C., and *Chubb*, for the Defendant *Curteis*:—

We submit that we are entitled, on our counter-claim, to a judgment for specific performance. As to the purchaser's right to repudiate, it is clear that time was not of the essence of the contract, for the third condition, in providing for payment of interest if the purchase is not completed by the day named, shews an intention that the bargain is to be kept alive: *Patrick* v.

(1) 29 Ch. D. 661.

Milner (1); *Webb* v. *Hughes* (2). The only way time could have been made of the essence of this contract was by the purchaser giving us notice limiting the time for completion, after the expiration of which the contract would have been at an end: but this he did not do. It is laid down as settled law that if either party to a contract is guilty of delay, the other side should give him written notice that he shall consider the contract at an end if it be not completed within a reasonable time to be named: *Green* v. *Sevin* (3); *Sugden's* Vendors and Purchasers (4). We therefore submit that the purchaser was not in a position to repudiate. In *Hoggart* v. *Scott* (5), *Forrer* v. *Nash* (6), and *Brewer* v. *Broadwood* (7) the vendor had no title at all, so that those cases do not apply.

With regard to the right of a tenant for life to sell under the *Settled Land Act*, 1882, it is an absolute right, unfettered by any control on the part of the trustees under the Act, except in the case of a sale of the mansion and park under sect. 15; this is clear from a consideration of sects. 3, 8, 20, 21, 22, 31, 38, and 45, as amended by sect. 5 of the Act of 1884. It is sufficient if at any time after the contract trustees are appointed to whom notice may be given under sect. 45, and who may receive the purchase-money under s. 22. The contract by the tenant for life binds the land (sect. 31, sub-sect. 2), and the Act does not require as a condition precedent that, before he enters into the contract, he shall give notice to the trustees: the giving of the notice is a matter between him and the trustees, and one with which the purchaser has no concern: *Duke of Marlborough* v. *Sartoris* (8).

Dauney, in reply.

KAY, J. (after stating the object of the action and reading conditions 3 and 7, continued):—

The obvious inference from these conditions is, that the 29th of September, the time fixed by the third condition for completion, was not for all purposes of the essence of the contract.

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(1) 2 C. P. D. 342.

(2) Law Rep. 10 Eq. 281, 286.

(3) 13 Ch. D. 589.

(4) 13th Ed. p. 227; 14th Ed. p. 268.

(5) 1 Russ. & My. 293.

(6) 35 Beav. 167.

(7) 22 Ch. D. 105.

(8) 32 Ch. D. 616, 620–3.

The vendor was tenant for life, and he was selling under the powers of the *Settled Land Act*. A very important question indeed has been raised, and it arises out of the following facts. [His Lordship then read the correspondence between the vendor's and the purchaser's solicitors down to the 11th of October, and continued:—] The first question is whether or not the view of the case taken by the purchaser's solicitor in his letter of the 11th of October is accurate. Was it the case that the absence —or the non-existence I should rather say—of trustees for the purposes of the *Settled Land Act* put the tenant for life in such a position that he had no power to sell? Looking at the *Settled Land Act* I do not come to that conclusion.

The scheme of the Act seems to be clearly this—that the tenant for life is, *quâ* tenant for life, to have an absolute and (except in certain instances pointed out by the Act) an unfettered right to sell. It is true that the persons to receive the purchase-money are, not the tenant for life, but trustees, either specially or otherwise appointed for the purposes of the Act: or, at the option of the tenant for life, there being such trustees, it may be directed to be paid into Court. The trustees for the purposes of the Act have an express power under the Act to give receipts for any moneys paid to them, and the purchaser paying his money to the trustees, unless he were otherwise directed by the tenant for life, would be quite safe. If there were trustees and the tenant for life preferred to have the money paid into Court and told the purchaser so, then he would be quite safe in paying it into Court: it would not be proper for him, in any case, as I read the Act, to pay it to the tenant for life. It is obvious that the consent of the trustees to the sale by the tenant for life is not wanted except in one case which is specified in sect. 15.

I observe that in the sections which confer powers on the tenant for life, the powers are not merely powers of sale. There is sect. 3, for example, which confers a power of sale; sect. 6, which confers a power of leasing; sect. 13, which confers power to accept surrenders of leases; and sect. 31, which confers the power of contracting. There is not a word said about the consent of the trustees being wanted, nor any reference to the trustees; but in sect. 15 there is this provision: "Notwithstanding anything in this Act, the principal mansion-house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court." Now *expressio unius est exclusio alterius.* If in a particular case it is expressed that the consent of the trustees is necessary, the obvious inference is that in other cases where the tenant for life exercises his power the consent of the trustees is not necessary.

Then, turning to the sections concerning trustees which are later in the Act, in sect. 38 there is a power to appoint trustees; and then, in sect. 40, there is a power for them to give receipts. Sect. 41 limits the liability of each trustee to what he actually receives, and sect. 42 is in these terms: "The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease."

In sect. 44 there is this provision: "If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit." The "trustees of the settlement" in

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that section clearly include trustees for the purposes of the Act. That is obvious on looking back to sect. 38, which says that: "If at any time there are no trustees of a settlement within the definition in this Act"—that is, the definition in sect. 2, sub-sect. 8—"or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed," the Court may appoint "trustees under the settlement for purposes of this Act."

Now, I apprehend the position of trustees with regard to the question now before me is this: they have no such duty to control the tenant for life, in case of his sale of the settled land, as would make them liable in any way if the sale were improper. At the same time it would be quite right for them, if a sale were proceeding which they did not approve of and which they thought was improvident, to submit the matter to the Court under the powers given in sect. 44. Unless there were an actual case of complicity in an improper sale by the tenant for life, the trustees, as I read the Act, have really nothing to do with the sale except to receive the money. They are not parties to the sale in any way: it is not a sale by them: they have no power to exercise any discretion in respect of it, and therefore, their consent being quite unnecessary, and the purchaser having nothing whatever to do with them except to pay his purchase-money to them, the fact that there were no trustees at the time, or that no notice had been given to the trustees if there were any, is not a defect of the title of the tenant for life to sell. That is the point for which I am at present examining these sections.

As to the notice, there is an express provision in sect. 45, which is the section that empowers the tenant for life to give notice—that "a person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section." It is said that that does not absolve a purchaser who knows that no notice has been given, and that in that case he might be liable if he were to complete his purchase. With that point at present I have nothing to do, and I will not pause to give any opinion upon it. What I do hold is that the defect which existed at the time when the objection was made was not a defect of the vendor's title to sell. It seems to me he had a right to sell; that the contract, as between him and the purchaser, was a perfectly good one; and that the defect was, as between him and the purchaser (which is all I have now to deal with), a defect of this kind—that when the purchaser came to complete there would be no one to whom he could pay the purchase-money. I say that advisedly, because I agree with the argument which suggests that, unless there are trustees, the tenant for life could not properly direct the purchaser to pay the money into Court. The tenant for life, where there are trustees, has an option. He may then direct the purchaser to pay the money either to the trustees or into Court; but I think it is obvious that the meaning of the option is that he may choose between the two, and that that option cannot properly be exercised, and cannot really be exercised at all, if there are no trustees.

Well, then, what is the nature of the defect? No doubt, by one section of the Act the tenant for life, with respect to powers given him by the Act, is put in the position of a trustee. That section is sect. 53, which says, "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

Now, looking back to the power, I find, first of all, in sect. 3, powers of sale, exchange, and partition, with, in sect. 4, the usual provisions which one finds in such powers, for instance: "Every sale shall be made at the best price;" and "every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained," and so on. So that I think the meaning of this 53rd section is that, for the security of the remaindermen, as between the tenant for life and them, he in exercise of this power shall be treated as a trustee and shall have all the liabilities of a trustee exercising a like power. The consequence of that is, no doubt, that if a purchaser knows the tenant for life is exercising the power improperly, and is aware that what the tenant for life is doing would amount to a breach of trust, he, the purchaser, has a perfect right to say, "I will not complete."

For instance, take this very case. If the tenant for life had said, "I will not have any trustees appointed, and I call upon you to pay the money to me," the purchaser would have a perfect right to say, "I will do nothing of the kind; that will be a breach of trust on your part, and I will not incur any risk through a breach of trust."

But the question raised by these letters is really, as I have said, not so much a question of title as a question whether, when the sale comes to be completed, the tenant for life can properly pay his purchase-money to any one or not. It is with that question alone that he is concerned.

Now, as I have pointed out, the vendor practically admitted that, in proceeding, as he did at first, to sell under the mistaken impression that the trustees of the will were trustees for the purposes of the Act, he was in the wrong. When the point is called to his attention he does not say, "I will not redress that wrong; I will not put it right;" but he says, "I will put it right;" and he proceeds to take out a summons, which was actually taken out on the 6th of October, to appoint trustees for the purposes of the Act. It is not until after he has done that, and given notice of his having done so, that the Plaintiff, the purchaser, proceeds to repudiate the contract. Therefore, the defect being rather a defect of conveyance than a defect of title, the next question is whether the purchaser was right in saying, "I repudiate because of that defect;" or whether his more proper course would not have been to say, "I give you a reasonable time to remove that defect, and I give you notice now that if it is not remedied within a reasonable time, say a month or two months, I repudiate the contract." In my opinion, the latter was the reasonable and proper course for him to have taken. It is plain that if he had been a willing purchaser, that is the course he would have taken, because the defect was one which it was quite easy to remedy, and it was not likely that any considerable time would be taken up in remedying it; in point of fact there was an order appointing trustees made on the 29th of October. On the same day the trustees, under the later Act of 1884, waived the notice, which they had power to do, and on that same 29th of October notice was given to the Plaintiff that the defect, which I call rather a defect of conveyance than a defect of title, was remedied, and accordingly he should have completed. Now up to that time the Plaintiff had taken no step to get rid of the contract, except by the repudiation by letter, and it was after that notice was received by him, namely, on the 3rd of November, that he issued the writ in this action. To justify that the Plaintiff says the time fixed for completion by the contract was so completely of the essence of that contract that, as the vendor was not then ready to give him a good receipt for his purchase-money, or to enable him to get a good receipt for his purchase-money, although the vendor was ready after the day fixed, he, the Plaintiff, was entitled to refuse to complete. I do not think the Plaintiff's contention is correct. No doubt there are certain authorities which say that, where the defect is a defect of title, the purchaser is not bound to wait, after the day fixed for completion, for an indefinite time until the vendor can make a title to the thing he purports to sell; but I do not know that that doctrine has ever been carried beyond a case in which the defect is a defect of title; and that is why I have taken some pains to shew that, in my opinion, the defect is not a defect of title. I do not think that is the doctrine of this Court, as far as I am aware, where the defect is a mere defect of conveyance.

In the present case there was the absence of trustees who could give a proper receipt for the money, which defect could be easily supplied in a short time. I agree that in no case is a purchaser bound to wait indefinitely; but then there is a series of well-known cases which have decided that in a case of that kind he is not at liberty *brevi manû* to say, "I put an end to this contract, and I will give you no time to remove this defect." Rather his proper course is to say, "I will give you a reasonable time to remedy those defects, and if, at the end of the time which I now stipulate as being a reasonable time, it is not remedied, then I shall repudiate the contract."

Accordingly I think the purchaser is in the wrong, and as he brought this action deliberately after he knew that the defect was actually remedied, and that the vendor was in a position to

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give him a conveyance and provide him with a perfect receipt for his purchase-money, I think I must order him to pay the costs of this action.

On the counter-claim there will be the usual order for specific performance, with costs, the Plaintiff accepting the title.

Solicitors: *Harries, Wilkinson, & Raikes; Russell, Son, & Scott.*

G. I. F. C.

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REPUBLIC OF PERU *v.* DREYFUS BROTHERS & CO.

[1886 P. 2767.]

Foreign Government—International Law—Contract—De facto Government—Rebel State—De jure Government—Confiscation—Repudiation—Rights of Third Parties.

Where the revolutionary or *de facto* Government of a country has been recognised by the Government of a foreign State, a subject of such foreign State may safely contract with that *de facto* Government; and if, by subsequent revolution, the previously existing Government of the country is restored, the restored Government is bound by international law to treat any such contract as valid, and in a litigation with the foreigner, party to the contract, must adopt the contract, merely taking such rights as the *de facto* Government might have had under it.

Semble, that even in the case of a contract by a foreigner with a rebel State which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract.

MOTION.

This action was brought by the Republic of *Peru* claiming an injunction to restrain the Defendants from taking out of Court funds standing to the credit of an action of *Dreyfus* v. *Peruvian Guano Company*.

In the year 1869 the Defendants, Messrs. *Dreyfus & Co.*, who were subjects of *France* carrying on business in *Paris*, entered into a contract with the then Government of *Peru* under certain conditions expressed in a memorandum dated the 19th of August, 1869, which was signed in *Paris* on the 5th of July, 1869, for the purchase of 2,000,000 tons of guano at the price of 36 soles 50 cents. per ton, and article 33 of that contract provided thus:—

"All the differences to which the present contract may give

52.58 +59.

rise shall be decided by the tribunals of the Republic of *Peru. Dreyfus & Co.* bind themselves to submit to the decision of the said tribunals, but they reserve to themselves on their part the exclusive right of submitting to the respective tribunals of the country of every consignment, whether directly or by the medium of the fiscal agent who may present himself to the Government, every difficulty which may occur or arise with the consignees in the course and for the execution of this contract."

By further agreements of the 17th of August, 1869, and the 14th of April, 1874, the contract was modified so as to make the price per ton which Messrs. *Dreyfus* were to pay variable, and a dispute afterwards arose between them and the *Peruvian* Government as to the amount actually due from one to the other of them, Messrs. *Dreyfus* claiming against the Government some four millions English money; while, on the other hand, the Government, upon an investigation of the accounts to which Messrs. *Dreyfus* were not parties, claimed that nothing was due from them to Messrs. *Dreyfus*, but that, on the contrary, Messrs. *Dreyfus* were indebted to the Government in a sum of about £100,000. This result was stated in a document, called a decree or resolution of the Government, dated the 7th of June, 1878. Against this Messrs. *Dreyfus* strongly protested, but no proceeding was taken either by them or by the Government to submit their difference to the tribunals of the Republic of *Peru.*

In this state of things, a war having broken out between *Peru* and *Chili* in April, 1879, Señor *Nicolas de Pierola*, on the 23rd of December, 1879, became Dictator in *Peru*, the previously existing Government of that country being overthrown.

On the 13th of April, 1880, Señor *Pierola* was recognised by this country as the supreme ruler of *Peru*, and he was also so recognised by the Government of *France* and other European States. Upon his assuming the dictatorship Señor *Pierola* entered into negotiations with Messrs. *Dreyfus*, his first object, which was apparently unsuccessful, being to raise money by their assistance for the purposes of the *de facto* Government of *Peru*, and especially to carry on the war. In 1880, during his dictatorship, eleven ships were being loaded with guano which was to be despatched to the *Peruvian Guano Company;* but a dispute having

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arisen with that company, the bills of lading were sent to the financial agent of the Republic in *Europe*, with instructions that, if the *Peruvian Guano Company* refused to indorse them, the cargoes were to be applied in payment to Messrs. *Dreyfus*, with whom a contract had been entered into by the Government of Señor *Pierola*, dated the 7th of January, 1880. This contract purported to be made in order to put an end to the questions which had arisen between them and the Government of *Peru*. By it the parties agreed to cancel the previous contract of the 14th of April, 1874; and, taking as a basis a balance of £4,000,000 sterling appearing, on accounts presented by Messrs. *Dreyfus* and dated the 30th of June, 1879, to be due to them from the Peruvian Government, Messrs. *Dreyfus* were to export a sufficient number of tons of guano to cover the said balance, and to credit it in account at the price which the new guano contractor might pay, and, in default of a contract, at £5 sterling per ton. The transaction amounted, in substance, to a complete alienation of the guano subject only to a condition, in order to prevent undue competition, for sale only in *France* and *Belgium*. The statements of account issued to the previous administrations of *Peru* were not to be taken as final, but the decision of such accounts was to be given by the tribunals of *Peru* within the maximum term of six months.

On the 4th of June, 1880, the then Government of *Peru*, in pursuance of a decree of Señor *Pierola*, as supreme chief of the Republic, and with the unanimous submission of the Council of Secretaries of State, and the consent of Messrs. *Dreyfus*, settled the account between the Government of *Peru* and Messrs. *Dreyfus* at £2,583,764 10*s*. due to the latter, thus reducing their claim by more than £1,400,000. Other communications passed, with the result that the amount due from the Government of *Peru* to Messrs. *Dreyfus* was agreed at a sum which exceeded the amount subsequently recovered by them in the action of *Dreyfus* v. *Peruvian Guano Company*. The bills of lading of the eleven ships were handed to Messrs. *Dreyfus*, and in 1880 they commenced the action against the *Peruvian Guano Company* to recover the cargoes of the eleven ships of guano.

In January, 1885, Vice-Chancellor *Bacon* gave judgment in that action in favour of Messrs. *Dreyfus*, and that judgment was affirmed on appeal in February, 1886.

In the course of that action the cargoes of guano were sold, and the proceeds were paid into Court, and invested.

In November, 1881, Señor *Pierola* resigned, and, after an interval, in June, 1886, the Government of *Peru* was reconstituted in the form in which it had existed previously to his dictatorship. On the 24th of October, 1886, the Congress of the Republic of *Peru* passed an Act declaring void all the internal acts of government done by Señor *Pierola.*

On the 22nd of November, 1886, the writ in this action was issued. At that date the funds in Court in the action of *Dreyfus* v. *Peruvian Guano Company* consisted of a sum of £200,256 6*s.* 1*d.* consols.

The Plaintiffs now moved the Court for an injunction to restrain the Defendants from taking out of Court the funds standing to the credit of the last-mentioned action.

Upon the motion being opened his Lordship suggested that, as it involved the substantial question in the action, it should stand till the trial with liberty to either party to apply to have the trial advanced; but after some discussion the Plaintiffs' counsel declined to accept the suggestion.

Rigby, Q.C., *Bramwell Davis*, and *G. M. Ballou*, for the Plaintiffs:—

Our contention is that the arrangements made by the Defendants, Messrs. *Dreyfus*, with Señor *Pierola's* Government, by which Messrs. *Dreyfus*' position became converted from that of debtors into that of creditors, are absolutely void. *Pierola* was nothing but a usurper, and all his acts were null and void from the first. The position of his Government was analogous to that of *Oliver Cromwell* during the Protectorate; *Cromwell's* Government having been, as Señor *Pierola's* Government was, recognised by foreign states. The restoration of the constitutional form of government of *Peru* in 1886 was exactly similar to the restoration of the Monarchy under *Charles* II., the internal acts of government done by the usurping power in both cases being null and void, with the exception of such as were confirmed by the *de jure* Government on its restoration. We do not, however, rely merely on the circumstance that *Pierola's* acts were *ipso facto* void, for we have the Act of Congress of the *Peruvian* Government expressly annulling all the internal acts of *Pierola's* Government. That is the Peruvian law as it now stands. The recognition by foreign States of the *de facto* Government of *Peru* was only for international and diplomatic purposes, and had nothing to do with the internal acts of that Government.

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the Defendants:—

The Plaintiffs' contention shortly is that *Pierola's* Government, being a Government *de facto* and not *de jure*, was incompetent to act as the Government of *Peru quoad* third parties, or to deal with the estate and property of *Peru quoad* third parties. That is a startling proposition; for it amounts to this, that from December, 1879, to June, 1886, there was no Government in *Peru* capable of levying taxes or raising loans for the administration of the country, or of making war. Instead of going back 200 years for a precedent one might be found of very modern date in the case of *France*. In 1848 the Government of *Louis Philippe* was overthrown, and a Republican Government was established in its place until 1851, when *Louis Napoleon*, the President of the Republic, himself assumed despotic government. Would it have been competent for *Louis Napoleon* to repudiate the acts of the Republic from 1848 to 1851? Such a contention is impossible. Provided a revolutionary Government of a particular country has been recognised by Her Majesty as the Government of that country, there can be no question but that the Courts of this country are bound by that recognition, and are not bound to consider the legal or illegal origin or character of that Government. That point has been already decided by Mr. Justice *Chitty*, in *Republic of Peru* v. *Peruvian Guano Company* (1), where the Peruvian Government raised the same contention as they are raising now, and failed. The same point was decided in *Emperor of Austria* v. *Day* (2). The authorities go still further, and establish this principle, that even in the case of a rebel Government not recognized by this country, the legitimate

(1) 36 Ch. D. 489.

(2) 3 D. F. & J. 217.

Government cannot, on its restoration, sue for the recovery of property alienated by the rebel Government without giving effect to contracts entered into by the latter: *United States of America* v. *Prioleau* (1). As regards the Act of Congress annulling the acts of *Pierola's* Government, such an Act could only affect the lives and properties of subjects of the Peruvian Government, and not the rights of third parties who were not its subjects. A confiscatory law, or a law of that character, has no effect beyond the ambit of the territory in which it has been passed. For instance, acts of confiscation against British subjects by the *United States of America,* after the Declaration of Independence and before the treaty of peace by which this country acknowledged the independence of the States, were considered as a nullity in the Courts of this country: *Folliott* v. *Ogden* (2). So, in *Wolff* v. *Oxholm* (3), a Danish ordinance of sequestration of the property of Englishmen pending hostilities with *Great Britain* was held to be no answer to an action in the Courts of this country by a British subject against a Danish. Again, in *Lynch* v. *Provisional Government of Paraguay* (4), administration was granted of the property in *England* of General *Lopez,* a domiciled Paraguayan, notwithstanding a decree of the Government of *Paraguay* confiscating his property. We submit, therefore, that the Act of Congress had no effect on the rights or property of English or French subjects acquired while *Pierola* was in power, and that the Plaintiffs have failed on this motion to make out any *primâ facie* case for keeping this money in Court, or any ground for a judgment in their favour at the trial.

Rigby, in reply:—

All that was decided in *Republic of Peru* v. *Peruvian Guano Company* (5) was that the Peruvian Government could not approbate and reprobate; that they could not retain moneys paid, and at the same time set aside the contract under which they were paid. *United States of America* v. *Prioleau* has no application, for the property for which the Government of the *United States* were suing had never belonged to them except by right of conquest. The proposition that penal laws have no extra-territorial effect cannot be disputed, but *Folliott* v. *Ogden* (1) did not proceed upon that, but upon the ground that dependencies of the *United Kingdom* cannot make adherence to our Government an act of enmity. So also *Wolff* v. *Oxholm* (2) had nothing to do with the question of penal laws, but merely decided that the passing of the Danish ordinance was a breach of international law which our Courts would not recognise. In *Lynch* v. *Provisional Government of Paraguay* (3) the decision merely was that, as the decree of the Government of *Paraguay* had no retrospective effect, the testator's will must be construed according to the law as it existed at the time of his death. A decree of confiscation is not a penal law. No power can interfere between the State and a subject, and the Defendants, by submitting to be bound by the law of *Peru*, have placed themselves in the position of Peruvian subjects, and the Act of Congress is therefore binding on them.

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(1) 2 H. & M. 559.

(2) 1 H. Bl. 123; 3 T. R. 726.

(3) 6 M. & S. 92.

(4) Law Rep. 2 P. & M. 268.

(5) 36 Ch. D. 489.

1888. Feb. 20. KAY, J.:—

By the motion in this case the Republic of *Peru* seek to restrain the Defendants, Messrs. *Dreyfus & Co.*, who are subjects of *France*, carrying on a large financial business in *Paris*, from taking out of Court certain moneys which are standing to the credit of another action in this Court of *Dreyfus* v. *Peruvian Guano Company*, in which the rights of these Defendants, Messrs. *Dreyfus & Co.*, to such moneys were established as between them and the *Peruvian Guano Company*.

The present Plaintiffs, the Republic of *Peru*, were not parties to that action. They watched the progress of it, and counsel attended on their behalf at the trial to observe what might take place. When I understood the object of the motion and the nature of the questions involved, I suggested that the motion should stand till the trial, and that either party should have liberty to apply to advance such trial, the money being kept in Court in the meantime. The Defendants were not unwilling to

(1) 1 H. Bl. 123; 3 T. R. 726.
(2) 6 M. & S. 92.
(3) Law Rep. 2 P. & M. 268.

assent to this if such trial could be arranged to come on within three months, and if the Plaintiffs would agree that in case any further evidence was wanted as to Peruvian law the witnesses should be produced in Court to avoid the expense of a commission to *Peru*. To this, however, the Plaintiffs, the Peruvian Government, declined to assent.

The Defendants, Messrs. *Dreyfus & Co.*, have been litigating with the *Peruvian Guano Company* for about eight years, and the Peruvian Government during all that time have not intervened until, on the 22nd of November, 1886, they issued the writ in this action. The material facts may be very simply stated. [His Lordship stated the facts of the case as above set out, and continued as follows:—] The short result of these facts is this. At the time when Señor *Pierola* seized upon the supreme power there was a question pending between Messrs. *Dreyfus* and the Peruvian Government as to the result of the accounts of their dealings in guano under the first contract. By art. 33 of that contract this question was to be settled by the tribunals of *Peru*. With the assent of Messrs. *Dreyfus* this provision was waived, and the amount due was settled by Señor *Pierola's* Government reducing the claim of Messrs. *Dreyfus* by more than £1,400,000. To this settlement Messrs. *Dreyfus* assented. They were not subjects of the State of *Peru*, but of *France*. The French Government had recognised Señor *Pierola's* Government as the *de facto* Government of *Peru*. Señor *Pierola* made provision for paying this amount by consigning fresh cargoes of guano to Messrs. *Dreyfus*. They have recovered these cargoes after long litigation with the *Peruvian Guano Company*, who claimed them, and the present Government of *Peru* are now seeking to deprive them of moneys, the proceeds of these cargoes, on the ground that by the law of *Peru* the arrangement with Señor *Pierola's* Government was void.

It is difficult to see how this can be determined by the law of *Peru*. It is a question of international law of the highest importance whether or not the citizens of a foreign State may safely have such dealings as existed in this case with a Government which such State has recognised. If they may not, of what value to the citizens of a foreign State is such recognition by its Government? There have been successive Governments in European countries — usurpations of the power of previous Governments overthrown—altering the constitution essentially. These have in turn been recognised by this and other nations. When the Government of this country recognised the third Emperor of the French, if any Englishman entered into contracts with his Government, could it be maintained that the validity of such contracts must depend upon the law of *France* as settled by decree of the Republic which was established on his deposition? Obviously it would follow that no Englishman could safely contract with the present Government of *France*, or, indeed, with any existing Government, lest it in turn should be displaced by another Government which might treat its acts as void.

There is no authority for any such proposition. I must take the law to be that an Englishman or Frenchman might safely contract with Señor *Pierola's* Government, if not before, at any rate after, it was recognised by the Governments of *England* and *France* respectively.

But an agreement between the Government of *Peru* and Messrs. *Dreyfus* containing a clause like article 33 of the original contract, submitting all questions upon such contract to the tribunals of *Peru*, might, of course, be modified by assent of both contracting parties, or of one of such parties and another Government who had succeeded to the rights of the former Government. If Señor *Pierola's* Government had succeeded to the rights of the former Government of *Peru*, of course a new convention between his Government and Messrs. *Dreyfus* modifying the contract in this respect would be as valid as if entered into with the Government who made the contract originally. This is what actually occurred. Señor *Pierola's* Government did settle with Messrs. *Dreyfus* the amount to be paid to them under the original agreement, without resort to the tribunals of *Peru*, just as the original contracting parties might have done. How can that be invalidated? Only by shewing that Señor *Pierola's* Government had no authority—that is, that it was not for the time being the Government of *Peru*. But that question, as far as Messrs. *Dreyfus* are concerned, is settled by the recognition of Señor *Pierola's* Government by *France*, and is in no sense a question

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of the law which the Republic of *Peru* may now think fit to recognise.

The decisions on the subject are completely in accordance with the law as I have stated it. I prefer to look somewhat further than the few cases cited at the bar; but all the authorities to which I shall refer are within the last 100 years. There have been in the history of the world during that period many revolutions and usurpations of supreme power among civilized nations who recognise international law. The Plaintiffs' counsel have been unable to cite, nor can I find, any authority whatever in favour of their contention.

There is a case of *Barclay* v. *Russell* (1), in 1797, after the acknowledgment by this country of the independence of the *United States*, which was in 1782. In that state of things Lord *Eldon* refused to recognise the right of the *United States of America* to certain property in this country, consisting of Bank stock which had been purchased by the Government of *Maryland* in the names of trustees in this country before the war with *America*, upon the ground that the rights of *Maryland* in its former condition existed under letters patent granted by the Crown of *England*, and had not passed to the new State of *Maryland*. That State had, before the treaty of peace, passed an Act discharging the trustees and appointing new trustees, and directing a transfer of the Bank stock in this country. Lord *Eldon* said (2): "They have no right as an independent State to make such an Act as that. No foreign authority of the Germanic body or *France* or *Spain* could do such an act. Nothing they could do with regard to this, can be implied from the treaty. There might have been an express article in the treaty upon their claim to this subject. It might have been the subject of a specific article. Such a demand is a fit subject of treaty; to be settled as between States independent. I can find no general principle in any writer upon the Law of Nations, if it was proper for me to decide by reference to those laws; but I have looked for my own satisfaction; and I find no general principle carrying it farther, than that the new-formed Government may invest itself with all the rights that it can command: no farther. The old Government

(1) 3 Ves. 424. (2) 3 Ves. 434.

of *Maryland*, a Government of a singular species, existing by letters patent, in some degree similar to a corporation, possessing rights in *England*, must sue in *England*, and ought to be regulated by the law of *England*; under which it has its existence. In the argument it was said, the present State of *Maryland* has some species of right to stand in the place of the old Government, being now acknowledged to be a legitimate Government. I can admit, that there is a semblance of equity in the claim upon the part of the present State of *Maryland*. The stock was certainly purchased at the expense of the people of *Maryland*." And his Lordship held that the specific execution of the trust having become impossible, the right to dispose of the money was vested in the Crown.

In a later case of *Dolder* v. *Lord Huntingfield* (1) Lord *Eldon* explains that decision by stating that *Maryland* was only a corporation under the great seal of *England*, and was dissolved by means which a Court of Justice in this country was obliged to consider rebellious, and that, therefore, such Court could not admit that the title passed to the independent States of *America* by an act which we were obliged to call rebellion. But in the case then before him, which was a claim by the Republic of *Switzerland* to certain moneys which had been remitted by some of the cantons to this country before the consolidation of the Republic in 1798, Lord *Eldon* said: "This is perfectly different. No civil offence has been committed against this country by the dissolution of the former Government, or the arrangement of the present Government, in *Switzerland*. The question is therefore to be discussed upon great principles of the law of nations; without attending to the situation of the defendants, as subjects of this country." The defendants in that case were the agents, the *Bank of England* and the *South Sea Company*, to whom the property had been remitted, and the matter came on upon exceptions to their answers. Lord *Eldon's* opinion, as I have read it, was clear that the rights of the Swiss Government over the property in question must be determined by international law.

In *City of Berne* v. *Bank of England* (2) Lord *Eldon* refused to grant an injunction to restrain the *Bank of England* from permitting a transfer of certain funds, standing in their names under a purchase by the old Government of *Berne* before the Revolution, expressly on the ground that the existing Government of *Switzerland*, not having been acknowledged by the Government of this country, could not be noticed by this Court, his Lordship stating that whether the foreign Government is recognised or not is matter of public notoriety. It appears from a note to that case that this decision was followed in 1823 in a suit instituted by persons representing themselves as the Colombian Government, which was not recognised by the Government of this country. These are decisions that a Government not so recognised cannot sue in the Courts of a foreign country.

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(1) 11 Ves. 283, 294.

(2) 9 Ves. 347.

In *Gelston* v. *Hoyt* (1), in the Supreme Court of the *United States,* the law is stated thus: "No doctrine is better established, than that it belongs exclusively to Governments to recognise new States in the revolutions which may occur in the world; and until such recognition, either by our own Government or the Government to which the new State belonged, Courts of Justice are bound to consider the ancient state of things as remaining unaltered. This was expressly held by this Court in the case of *Rose* v. *Himely* (2), and to that decision on this point we adhere. And the same doctrine is clearly sustained by the judgment of foreign tribunals: *The Manilla* (3); *City of Berne* v. *Bank of England*" (4). The case of *The Manilla,* there referred to, and another case in the same book, *The Pelican* (5), were with reference to vessels which had been captured during the war with *France* on voyages from *Port au Prince* in *San Domingo.* That part of the island had revolted against *France* and maintained an independent Government. This had been to some extent recognised by Orders in Council in this country which did not expressly refer to *Port au Prince*, but Sir *William Scott* and Sir *William Grant* in these two cases held the recognition sufficient to prevent the captures being lawful, on the ground that the ships were trading to ports not of their own country from a colonial port of the enemy. The port after that recognition could not be treated

(1) 3 Wheat. 246, 324.
(2) 4 Cranch, 241.
(3) 1 Edw. Adm. 1.
(4) 9 Ves. 347.
(5) 1 Edw. Adm. App. D.

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as a port of the enemy. In *United States of America* v. *McRae* (1) *James*, L.J., then Vice-Chancellor, says (2): "I apprehend it to be the clear public universal law that any Government which *de facto* succeeds to any other Government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect of the public property, of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouses, forts, or arsenals, would, on the success of the new or restored power, vest *ipso facto* in such power; and it would have the right to call to account any fiscal or other agent, or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a Government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character, of a Government. But this right is the right of succession, is the right of representation, is a right not paramount but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights as if that authority had not been suppressed and displaced and was itself seeking to enforce it."

In *Wheaton's* International Law (3) the doctrine is thus stated: "If, on the other hand, the revolution in the Government of the State is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate Government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the State, returns to the sovereign along with the sovereignty. Private property, temporarily sequestered, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii*. But if the national domain has been alienated, or the private property confiscated by some intervening act of the State, the question as to the validity of such transfer becomes more difficult of solution. Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized. But in the case of international transactions, where foreigners and foreign Governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign Governments and their subjects treat with the actual head of the State, or the Government *de facto*, recognised by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such Government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were acts of him who is considered by the restored sovereign as an usurper. On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations." This distinguishes the dealings as to the public property of a State between the State and its own subjects from similar dealings with foreigners, which the succeeding Government by international law must treat as valid.

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(1) Law Rep. 8 Eq. 69. (2) Law Rep. 8 Eq. 75.
(3) 2nd Ed. p. 41.

Another objection was urged against this motion to which I have not heard any satisfactory answer. The Plaintiffs are seeking to prevent the Defendants from receiving the proceeds of eleven cargoes of guano which were consigned to them on certain terms by Señor *Pierola's* Government, disregarding the terms on which such consignment was made. In *United States of America* v. *Prioleau* (1), a similar claim was made to goods which rebellious States of *America* had sent to a citizen of this country. The rebellious States had been conquered by the *United States* Govern-

(1) 2 H. & M. 559.

ment; they had never been recognised by *England's* Government. Yet it was held, and the decision has not been questioned, that the contract under which the goods were sent must be recognised, and that they could not be recovered in violation of that contract. It was not doubted that the *United States* were entitled to all public property belonging to the rebellious States; but where these States had dealt for value with citizens of another country such property could not be recovered by treating the contract as void. In a litigation with the foreigner, party to the contract, they must adopt the contract and merely take such rights as the *de facto* Government of the rebel States might have had under it. This doctrine is recognised in some of the other citations already made, especially in the words of Lord Justice *James*, which I have quoted. It was applied even in the case of rebel States which had not been recognised by this country. It follows *à fortiori* in this case that the Republic of *Peru* can only recover the proceeds of the eleven cargoes of guano if Señor *Pierola's* Government could have done so. That Government certainly could not have recovered them in violation of its own contract, as the Republic of *Peru* are now seeking to do.

The duty of the Court upon a motion like this is to consider, upon the evidence before it, whether the Plaintiffs shew a probable case for relief at the hearing. If they do not, the Court should be very reluctant to interfere with the rights of the Defendants by interlocutory injunction. I am bound to say that I see no such case. If this were the trial I should decide against the Plaintiffs without hesitation, and as no facts are in dispute, and the law of *Peru* seems to me not to be in question, I cannot anticipate that the Plaintiffs' case will be improved at the trial. Another most important consideration is the relative convenience or inconvenience to the parties of granting or withholding an injunction. Where the plaintiffs do make out a probable case for ultimate relief, or where the evidence leaves this so much in doubt that the Court must see there is a serious question of difficulty to try, then this matter of convenience becomes of paramount importance. I cannot think that to be the case here. But, if I must consider it, these are the facts. The sum in Court in the other action is something more than £200,000 consols.

Of this amount about £100,000 may now, I understand, be taken out by the Messrs. *Dreyfus* under the final judgment in that action. They have been litigating the matter for eight years, during most part of which time the Peruvian Government have been passive but interested lookers-on. To retain in Court £100,000, even if the interest at 3 per cent. were allowed to Messrs. *Dreyfus*, must occasion to a mercantile house a most serious inconvenience and loss. It has not been suggested that Messrs. *Dreyfus* will not be perfectly able to meet any claim made by the Peruvian Government in this action, if it should be established against them. The Peruvian Government have declined the offer which would have enabled me to advance the trial; and after hearing the motion the duty of the Court to other suitors prevents it from allowing such precedence. The suit may drag on and not be finally decided for a long time. If the money be impounded, the Peruvian Government will have no particular interest in expediting matters, and will obtain a great advantage against the Defendants to which, in my opinion, they have no right. They have given security for costs to a considerable amount, but whether it will cover the costs actually incurred already may be doubted. The balance of convenience and inconvenience is, I think, decidedly against granting the injunction. After full consideration I think it the duty of the Court not to encourage this litigation in any way, but to refuse the motion with costs.

Solicitors: *G. M. Clements; Batten, Proffitt & Scott.*

G. I. F. C.
C. C. M. D.

CHITTY, J.
1888
April 11.

In re WEST LONDON COMMERCIAL BANK.

Crown—Prerogative—Debtor to Crown—Priority.

Letter-receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post-office into a bank to their private account, together with their own moneys, and of drawing cheques both for their own purposes and for payment to the Post-office. The bank had notice that their customers were letter-receivers, and drew cheques for Post-office purposes. The bank having gone into liquidation :—

Held, that the Postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter-receivers' accounts in respect of Post-office moneys.

Rex v. *Ward* (1) followed.

MOTION on behalf of Her Majesty's Postmaster-General for an order against the official liquidator of the *West London Commercial Bank* for payment to the Receiver-General and Accountant-General of the Post-office, on behalf of the Crown, of a sum of £509, which by an order in this matter of the 25th of February, 1887, was ordered to be carried to a separate account intituled "The moneys claimed by the Postmaster-General on behalf of Her Majesty to answer the claim respecting which a fiat, dated the 12th of February, 1887, has been obtained for the issue of a writ of extent against the bank to recover the sum of £——."

The question was, whether the Crown was entitled to payment in full out of the assets of the bank in liquidation in priority over other creditors, of the balance of moneys paid into the bank to their private accounts by letter-receivers, with the knowledge and sanction of the Postmaster-General, to meet cheques drawn by them from time to time in favour of the Post-office.

It appeared from the evidence that it was the practice to allow letter-receivers to retain in hand a certain sum in cash to meet the purposes of their own office (savings bank warrants, money and postal orders), and at the end of each day to remit to the office of the Receiver and Accountant-General of the Post-office sums sufficient to reduce the balance in hand to about the normal sum. Formerly the money thus sent was remitted to the chief office in cash, but for some years past it had been the practice, with the sanction of the Postmaster-General, for the letter-receivers to open an account at some bank, and to remit their balances by cheque. Such accounts were usually opened in the private name of the letter-receiver, and were not confined to Crown moneys, other moneys being paid in and cheques drawn for the private purposes of the persons who opened the accounts, but the bank was in the habit of issuing, at the request of the letter-receivers, in addition to the ordinary stamped cheque-books, cheque-books containing unstamped cheques overprinted with the words "On Her Majesty's service," for the purpose of payments in favour of the Postmaster-General. There was nothing, however, in the books of the bank to shew that the moneys paid in by the letter-receivers related to anything but their private accounts, or included Crown moneys.

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(1) 2 Ex. 301, n.

At the time when the bank stopped payment cheques for over £500, drawn by the letter-receivers in favour of the Postmaster-General, were outstanding, and on account of the stoppage could not be presented.

On the 12th of February, 1887, a fiat was obtained on behalf of the Crown for a writ of extent against the bank to recover the account for which the unpaid cheques had been drawn; and by order of the 25th of February, 1887, the amount due in respect of these unpaid cheques was ordered to be carried to a separate amount to answer the claim of the Postmaster-General.

On behalf of the official liquidator it was not admitted that the bank had any notice that the moneys paid in by the letter-receivers were Crown moneys; but notice to the bank that the persons banking with them were letter-receivers, and from time to time drew cheques upon their balances for the purposes of the Post-office, was admitted.

Sir *E. Clarke*, S.G., and *C. T. Simpson*, in support of the motion:—

The accounts with the bank being kept by persons who, to the knowledge of the bank were receiving moneys on behalf of the Postmaster-General, and from time to time, by cheques drawn by

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themselves, paid those moneys to the Postmaster-General, privity is established between the bank and the Crown, and the bank became immediate debtors to the Crown in respect of the balance of the moneys so paid in, and, upon the evidence, traced as Crown money: *Rex* v. *Wrangham* (1); *Reg.* v. *Adams* (2); *Rex* v. *Ward* (3).

The prerogative not being affected by the winding-up, the Crown is entitled to payment, in priority over the other creditors of the bank, of the amount claimed.

Romer, Q.C., and *Swinfen Eady*, for the official liquidator of the bank:—

We admit, upon the authorities, that if *A.* with moneys of the Crown in his hands wrongfully pays that money to *B.*, with knowledge on the part of *B.* that the money is Crown money; or, again, if *B.* receives the money under express or even implied obligation to hold it for the Crown, then privity is established between the Crown and *B.*, who becomes a debtor to the Crown. But if the Crown (here the Postmaster-General) has known of and consented to the payment by the receivers of Crown moneys into the bank, with, and undistinguished from, their own moneys, the mere fact of such payment does not make the bank a debtor to the Crown, so as to give the Crown priority over other creditors of the bank. The whole basis of the decisions in *Rex* v. *Wrangham*, *Reg.* v. *Adams*, and *Rex* v. *Ward*, rests upon the fact that in those cases the payment into the bank by the Crown agents was wrongful.

[CHITTY, J.:—The argument is ingenious, but it is not borne out by the cases, which say: Anybody who receives money knowing or having reason to believe it is money of the Crown, becomes a debtor to the Crown. There is nothing about rightfully or wrongfully, with or without authority.]

In those cases it was not alleged that the agent in paying in the money did so with the consent of the Crown, and that, we submit, distinguishes them from this case, where, by the course adopted by the Postmaster-General himself, the bank has been

(1) 1 Cr. & Jer. 408.

(2) 2 Ex. 299.

(3) 2 Ex. 301, n.

made accountable to the agents and servants of the Post-office, and is relieved from any liability to the Crown in respect of the accounts of the letter receivers, which were private accounts in all respects and so treated. If the contention on behalf of the Crown is correct, then directly the bank received any moneys from the customer which it might suppose were Crown moneys the bank would become accountable to the Crown for the whole amount, and the private cheques would not operate as a discharge. We submit that we never became debtors to the Crown, but to the letter-receivers, as our private customers only. And if not debtors to the Crown when the bank was a going concern, we did not become Crown debtors after the winding-up.

The *Solicitor-General*, in reply.

CHITTY, J. (after stating the facts, proceeded) :—

On the evidence it is clear that the bank knew from time to time that moneys were paid in by these debtors to the Crown, and the moneys so paid in were Crown moneys. About that there can be really no dispute. The accounts, however, were not confined to the Crown moneys: other moneys belonging to the letter-receivers were paid in, and some of the cheques drawn were cheques drawn for private purposes of the persons who opened the accounts.

The law, I take it, now is quite settled, and the case is covered by the authorities that have been referred to, *Rex* v. *Wrangham* (1) *Rex* v. *Ward* (2), and *Reg.* v. *Adams* (3). In *Rex* v. *Wrangham* Lord *Lyndhurst* laid it down that whoever receives money of the Crown becomes an immediate debtor to the Crown. It is not necessary to consider whether to that proposition should be added the words "knowingly receives," because the evidence in this case shews that the moneys that were received were received by the bank in circumstances similar to those that are found in *Rex* v. *Ward*. There the affidavit on behalf of *Ward*, the banker, or his assignee, shewed that the banker had never had notice, nor did he ever positively know that the moneys paid

(1) 1 Cr. & Jer. 408.

(2) 2 Ex. 301, n.

(3) 2 Ex. 299.

into his hands by *John Rixon*, or any part, belonged to the Crown, though he certainly did believe that some part of the money so paid into his hands for *John Rixon* might have been received for taxes; but what amount he did not know. It is plain in this case the bank had reason to believe that a portion of the moneys paid in was Crown moneys. According to the report, *Parke*, B., stated the law to be "that anyone is in privity with the Crown who knows that the money which he receives is the money of the Crown." It has been argued that what was done was done with the Postmaster-General's authority, and that the Postmaster-General had authorized the payment of these moneys into the bank to an account which was not shewn to be a Crown account, and allowed the receivers to deal with the moneys as their own, and that in these circumstances the bank never became immediate debtor to the Crown. It was further contended that if the bank had been debtors to the Crown, the Crown could at any time while the bank was a going concern, have sued the bank and disavowed all the cheques which had been drawn by the receivers in their own favour, or for their own private purposes. That argument, it appears to me, is answered by the observation that, assuming that the Postmaster-General authorized the payment of the moneys into the bank, as stated, then he authorized also, on behalf of the Crown, the course of dealing pursued, viz., that the moneys should be drawn out by cheque of the person in whose name the account stood. Consequently the bank got a discharge from time to time by the very same authority which is relied upon, and as soon as a cheque was drawn, even for the private purposes of the particular receiver, the bank to that extent were no longer debtors to the Crown. Now, what the Crown is claiming is only the balance of Crown moneys remaining to the credit of each receiver's account; and in regard to that it is clear that the prerogative enables the Crown to trace the money of the Crown when once mixed up with the general funds of any person. It may be difficult, as *Pollock*, C.B., says in *Reg.* v. *Adams* (1), to trace the money of the Crown when mixed up with the general funds of any person; but still it may be followed wherever the evidence leads. The evidence leads in

(1) 2 Ex. 300.

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this case to the conclusion that the sums which the *Solicitor-General,* on behalf of the Crown, asks to be paid to him, are the moneys in that account which belonged to the Crown. The case is really covered by the authorities, and I make the order asked for.

Solicitors: *Robert Hunter (Solicitor for Post-office)*; *Chapple, Welch & Chapple.*

F. G. A. W.

NORTH, J.
1888
March 27;
April 11, 12.

In re WORSWICK.
ROBSON *v.* WORSWICK.

[1882 W. 4946.]

Discovery—Production of Documents—Privilege.

Transcript of shorthand notes of proceedings in open Court are not privileged.

Nordon v. *Defries* (1) observed upon.

THE Chaplains and Poor of *Wyggleston's Hospital, Leicester*, made a claim in this administration action for damages in respect of injury done by flooding a mine of which the claimants were owners in fee, alleged to have been caused in breach of a covenant by the wrongful working of a mine belonging to testator in the action.

The testator was lessee of adjoining coal-mines, one of which was held on a lease from the claimants; in this lease was contained the covenant on which the claim was founded. The testator's business was carried on under the name of the *Swannington Colliery Company*. The *Snibston Colliery Company* were lessees of two collieries adjoining the testator's collieries, one of which was held under the claimants. The alleged wrongful working was done in the testator's colliery, not held of the claimants, and it was alleged that by such working the mine of the *Snibston Company* not held from the claimants had been broken into and drowned, and that the water had found its way into the mine which the *Snibston Colliery Company* held from the Plaintiffs and caused the injury in question.

The *Snibston Colliery Company* had brought an action against the Defendants, the testator's executors, in respect of the alleged breaking in to their mine. The action came on for trial before Mr. Justice *Pearson* on five days in February and March, 1886. It was not tried out, but was compromised. It was admitted that the Defendants had taken shorthand notes of the proceedings. They had made an affidavit as to documents relating to the matters in dispute in this claim which made no reference to such shorthand notes.

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(1) 8 Q. B. D. 508.

The claimants under order duly obtained administered interrogatories to one of the Defendants. One of the interrogatories was partly addressed to other matters, and contained the following question as to shorthand notes: "and had not the *Swannington Colliery Company* or the Defendants, or some or one, and which of them caused to be taken shorthand writer's notes of the evidence in the said action so far as the evidence was taken, or how otherwise?"

The Defendant refused to answer this interrogatory on the ground that an affidavit of documents had been made.

This was a summons for a further answer.

The parties submitted to treat the question as being whether the shorthand notes taken at the trial were privileged.

Napier Higgins, Q.C., and *Nalder*, for the Claimants:—

The shorthand notes are clearly not privileged: *Nicholl* v. *Jones* (1); *Rawstone* v. *Preston Corporation* (2).

Everitt, Q.C., and *Butcher*, for the Defendants:—

This case is more like the common law case of *Nordon* v. *Defries* (3) than either *Nicholl* v. *Jones* or *Rawstone* v. *Preston Corporation*, in which the Court refused to order production of a transcript of shorthand notes taken in another action where it was said that the notes were taken with a view to further litigation: the notes in this case were taken pending the dispute with the claimant. If the shorthand notes are producible in this case they would be in any case; it could hardly be said that notes taken by the solicitor himself or his clerk were not privileged when taken for the purpose of conducting his case. There is no reason for any distinction whether the notes were abstracts or verbatim; clearly enough notes taken by the solicitor or counsel ought not to be produced. If this claim were to prevail, it would enable one party during litigation to get the shorthand notes at the expense of his adversary.

(1) 2 H. & M. 588.

(2) 30 Ch. D. 116.

(3) 8 Q. B. D. 508.

NORTH, J. (after disposing of the other matters, continued):—

With respect to the shorthand notes, all that I can do on this summons is to say that the affidavit is insufficient, and order a further affidavit, but I suggested to the parties, and they have, I think very wisely, adopted my suggestion that it should be left to me to say now whether the notes should be produced. I think they must be produced: what was taken down by the shorthand writers was taken in open Court, and there can be nothing privileged or confidential in what passes in open Court. In the case of *Nicholl* v. *Jones* (1) Vice-Chancellor *Wood* ordered that the indorsement of counsel should be produced, as well as the transcript of shorthand notes. I do not see any difference between the indorsements and the shorthand notes in this respect. Then we have a recent case before Mr. Justice *Kay*, *Rawstone* v. *Preston Corporation* (2), which I believe is the last case on the subject. The point there was precisely the same as here. I do not stop to read his decision, but it was that a transcript of notes was not privileged, and must be produced: that is in accordance with my own view, and upon those two cases I think I ought to act.

I ought not, however, to pass over the case of *Nordon* v. *Defries* (3), which seems, as to what was done, somewhat at variance with my view. The Court there decided the case upon the arguments before them, and if the case had been argued as this case has been argued before me, I think the Judges would have taken the same view that I do. Mr. Justice *Mathew*, who delivered the judgment of the Court, said (4): "It was argued that unless the affidavit shewed that documents sought to be protected came into existence exclusively for the purposes of the pending action, they were not privileged. But no authority was cited in support of this contention. It is probable in this case that the notes of the evidence were taken as well with a view to ulterior proceedings in the case of *Nordon* v. *Nordon* as for the purposes of this action. If so the notes would seem to have been clearly privileged in that suit, and it is difficult to see why their being privileged in one suit should destroy the privilege in another arising out of the same subject-matter. It seems unreasonable that a privilege in each should become a privilege in neither."

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(1) 2 H. & M. 588.

(2) 30 Ch. D. 116.

(3) 8 Q. B. D. 508

(4) Ibid. 510.

I do not think the learned Judges intended to depart from the view taken by the Vice-Chancellor in the previous case; and neither the arguments nor the judgment deal with the real question, whether a record of what is taken in open Court can be privileged at all; and there is nothing in that case which ought to prevent me from following the earlier case of *Nicholl* v. *Jones* (1) and the late case of *Rawstone* v. *Preston Corporation* (2).

It has been put in argument that supposing the shorthand notes had been taken by the solicitor's clerk—or the solicitor himself—they would have been privileged. I do not admit that would be so. A mere verbatim report of the evidence, whether by the solicitor's clerk, the solicitor, or counsel, would not in my opinion be privileged.

Solicitors for Claimants: *Collyer-Bristow & Co.*
Solicitor for Executors: *C. J. Mander.*

D. P.

NORTH, J.
1888
April 13.

In re FLETCHER.
GILLINGS *v.* FLETCHER.

[1887 F. 1337.]

Satisfaction—Ademption—Legacy—Debt.

A testator bequeathed his wife a legacy of £625. He then owed her that exact amount. The debt was paid off in his lifetime:—

Held, that the sum was not payable as a legacy.

HENRY ALLASON FLETCHER, the testator in this summons, made his will in September, 1876. He appointed his two brothers *William* and *Isaac* and his wife executors and trustees. He made a codicil dated the 30th of August, 1882, being at that time indebted to his wife in the sum of £625, on which he paid interest. The operative part of the codicil was as follows: "I hereby appoint *Alfred Sutton* of *Scotby*, near *Carlisle*, as executor and trustee under the said will, in place of my late brother *Isaac Fletcher*, deceased. And I hereby bequeath unto my wife the

(1) 2 H. & M. 588.

(2) 30 Ch. D. 116.

sum of six hundred and twenty-five pounds for her absolute use, in addition to any bequests to her in the said will."

In November, 1883, at the request of the testator's wife, he paid off the debt of £625, by investing that sum in her name in certain railway bonds. He drew a pen through the bequest in the codicil, but did not effectively revoke it. He died in July, 1884, and his will and codicil were duly proved by his wife and *William Fletcher* and *Alfred Sutton.*

The testator's widow had since married the Rev. *C. B. S. Gillings.*

This was an originating summons to which Mrs. *Gillings* was Plaintiff. The Defendants were her co-trustees and the children of her first marriage, who were infants. One object of the summons was to have it declared that the Applicant was entitled to the pecuniary legacy of £625 bequeathed to her by the said testator.

Cozens-Hardy, Q.C., and *Ashton Cross*, for the Plaintiff:—

This is a case in which neither the doctrine of satisfaction nor that of ademption applies. There would have been satisfaction of the debt by payment of the legacy only, if the debt had been alive when the testator died. The application of the doctrine of satisfaction only arises when the claim which is said to be satisfied can be made.

The doctrine of ademption only applies where there is a testator who is either *in loco parentis,* and has subsequently made an advance in performance of his duty, or has given a legacy for a particular purpose expressed on the face of the will, and that purpose has been carried out, or he has given a specific legacy of something which has ceased to exist: *Pankhurst* v. *Howell* (1); *In re Pollock* (2).

The doctrine that double portions are not to be given, has never before been applied to a case like the present; there is no reason apart from the artificial rules of the Court of Chancery why the wife should not be intended to have both the debt paid to her in her lifetime, and the legacy given her out of bounty or love. The legacy is meaningless if she is not to have both.

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(1) Law Rep. 6 Ch. 136.

(2) 28 Ch. D. 552.

The Court will not extend these artificial rules to a new case: *Atkinson* v. *Littlewood* (1).

Cookson-Crackanthorpe, Q.C., and *Frederic Thompson*, for the Defendants the trustees; and *W. F. Hamilton*, for the infants:—

The real question is what intention will the Court impute on the words of the will, taken with the surrounding circumstances, to the testator. The general rule is that where there is a debt due from the testator who leaves his creditor a legacy of at least as large an amount as the debt, the testator intends by the legacy to satisfy the debt. It will take much to rebut the presumption of such an intention where the legacy is of the exact amount of the debt, and the debt is an odd sum: *Talbot* v. *Earl of Shrewsbury* (2); *Rawlins* v. *Powel* (3).

Having once got the fact that the legacy is given to satisfy a particular purpose, to make an advance by a person *in loco parentis*, or whatever that purpose be, if the purpose is satisfied or fails by whatever means, the legacy falls with this purpose, that is, there is ademption: *Fowler* v. *Fowler* (4); *Monck* v. *Monck* (5); *Pankhurst* v *Howell* (6). The very origin of the rule against double portions is the presumption that a debtor does not mean to pay twice over: *Wetherby* v. *Dixon* (7).

Cozens-Hardy, in reply.

NORTH, J.:—

In the present case I think it is very probable that the widow herself took the view that the legacy was intended to provide for the debt. But I do not think she is bound in any way by the opinion she may have had, and I pay no attention to that.

The conclusion I come to is based simply on the legal effect of the acts done in the lifetime of the testator. At the date of the codicil he did owe his wife the sum of £625. By his codicil he gave her a legacy of that precise amount. I cannot imagine any reason for his giving that exact sum except to provide for the

(1) Law Rep. 18 Eq. 595, 603.
(2) Prec. Ch. 394.
(3) 1 P. Wms. 297.
(4) 3 P. Wms. 353.
(5) 1 B. & B. 298.
(6) Law Rep. 6 Ch. 136.
(7) 19 Ves. 407, 411.

payment of the debt. Afterwards the debt was paid off, and the purpose for which the legacy was given I am convinced was satisfied. But it is said that in order to treat the legacy as adeemed by such means it is necessary that the purpose must appear on the face of the will. It is clear that if the codicil had said in so many words that the legacy of £625 was given in satisfaction or payment of the debt, and the testator had afterwards paid the debt to her, she could not have got the legacy. I do not think that is disputed. But it is said that because there is no such reference to the debt in the bequest the payment of it cannot have that effect, and the legacy must not be treated as having been given for that purpose only. Suppose the debt had not been paid, could the widow have taken the debt as well as the legacy? I think clearly not. Though no doubt the Court is not disposed to hold there is satisfaction if it can help it, and has taken hold of slight circumstances to rebut the presumption against double portions, yet it is clearly established that if there is a legacy of equal amount with a debt, the creditor cannot take both the legacy and the debt unless there is something to take the case out of the general rule. In the present case there is nothing of the sort, and it seems to me that this legacy given by the codicil must be taken to have been given in satisfaction of the debt; and the presumption of law, in the absence of any evidence to rebut it, seems to me to put the matter in precisely the same position as if it had been stated in the codicil that the legacy was to pay the debt. That being so, the testator, having paid off the debt in his lifetime, his estate is relieved from the payment of the legacy. Mr. *Cozens-Hardy* says there is no case in the books where such a legacy has been treated as satisfaction of a debt except where either the debt has been in existence at the death of the testator, or the special purpose for which it was given has been mentioned in the will. In my opinion, as I have said, the case stands precisely in the same position as in the latter case, where the existence of the purpose is founded on a presumption of law, which there is no evidence to rebut. No doubt Lord *Selborne* in *In re Pollock* (1) does refer to the case where there is a reference to the purpose in the will. Such reference

(1) 28 Ch. D. 552.

NORTH, J.
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may be and is a very material circumstance, but I do not understand that the Lord Chancellor was exhaustively laying down the law as if he were writing a book, and no such presumption arose in that case. If I am right that the presumption of law produces exactly the same effect as if the purpose had been expressed, there are numerous authorities to shew that the legacy has been adeemed. I need only refer to the case of *Pankhurst* v. *Howell* (1). In that case a legacy was given to the testator's wife to be paid within ten days after his death. That did not make it incumbent to pay the legacy in the ten days, because the state of the estate might have been such that it would be improper to pay it within that time. During his last illness, at the request of his wife, who did not know the contents of the will, he had given her £200, that she might have a sum of money which she could control immediately on his death without the interference of his executors. It was held that the providing the wife with money immediately after the testator's decease was not a satisfaction of the particular purpose of the legacy. But Lord Justice *James* lays down the rule in this way (2): "The rule on this subject, as stated by Mr. Justice *Williams*, is, that where the testator stands neither in the natural nor assumed relation of a parent to the legatee, the legacy will be considered as a bounty, and will not be adeemed by a subsequent advancement, unless the legacy is given for a particular purpose, and the testator advances money for the same purpose, or unless the intention otherwise legally appear of making the advancement with a view to ademption. I think this refers to a legacy given for a particular specific purpose, as for instance a legacy given to purchase an advowson for a son, which would be adeemed, or perhaps it would be more correct to say satisfied, by the father afterwards purchasing the advowson for him. Here the legacy does not appear to me to have been given for a particular purpose within the meaning of the rule." In the present case it seems to me that the legacy was given for the particular purpose within the meaning of the rule because there is the presumption of law that the legacy of exactly the same amount is given in satisfaction of the debt. Under the circumstances, though I should be

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(1) Law Rep. 6 Ch. 136.

(2) Law Rep. 6 Ch. 137.

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glad to come to a different conclusion if I could, the result is that the payment of the debt must be taken to be an ademption of the legacy, and I cannot make an order in favour of the widow. I think it is a case in which the costs should come out of the estate.

Solicitors for the widow and infant children: *Speechly, Mumford & Landon.*

Solicitors for the trustee defendants: *Helder & Roberts*, agents for *Brockbank, Helder, & Brockbank, Whitehaven.*

D. P.

NORTH, J.
1888
April 20.

BRIDGETOWN WATERWORKS COMPANY *v.* BARBADOS WATER SUPPLY COMPANY.

[1887 B. 3069.]

Practice—Pleading Matter since Writ—Rules of Supreme Court, 1883, *Order* XXIV., *r.* 3—*Confession of Defence—Judgment for Costs.*

Defendants delivered a further statement of defence of matter arising since statement of defence put in. The Plaintiffs delivered a confession of the further statement of defence, and signed judgment for costs against the Defendants. The judgment for costs was set aside on terms of the Defendants withdrawing their further statement of defence.

THE writ in this action was issued on the 20th of June, 1887. The Plaintiffs were a company incorporated by a *Barbados* statute. The Defendants were an English company, registered on the 6th of December, 1886. The Plaintiffs claimed an injunction to restrain the Defendants from driving tunnels or carrying on other works in the Island of *Barbados* so as to divert the Plaintiffs' water supply.

The Defendants put in a statement of defence, delivered the 11th of August, 1887, by which they pleaded the authority of an Act of the *Barbados* Legislature, called "*The Water Supply Act*, 1886."

They delivered on the 9th of December, 1887, a further statement of defence under order dated the same day, setting forth a ground of defence which had arisen since the statement of defence, that "by an Act passed by the *Barbados* Legislature, assented to on the 30th day of November, 1887, it was provided that the

NORTH, J.
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said *Water Supply Act*, 1886, should apply to the Defendants as if they had been duly incorporated before the passing of the *Water Supply Act*, 1886."

The Plaintiffs, under Order XXIV., rule 3, delivered a confession of the further defence, and signed judgment for their costs up to that time on the 6th of April, 1888.

The Defendants now moved to set aside the judgment for costs.

Cozens-Hardy, Q.C., and *George Henderson*, for the motion:—

The object of rule 3, of Order XXIV., is, that where a defendant has a good defence arising after action brought, and the plaintiff was right in commencing the action, the plaintiff should be able to stop his action and get the costs he is fairly entitled to. In this case the Defendants believe they were right at the beginning. They ought not to pay costs simply because since action brought something has happened which gives them an additional defence: *Harrison* v. *Marquis of Abergavenny* (1). The statute now set up by the Defendants is simply a declaratory statute, and the Defendants have a good defence without it. At the same time we submit that the Defendants ought to be allowed the benefit of both their old and their new defence. But if the Court is of opinion that they ought to withdraw their further defence as a condition of setting aside the judgment for the costs they are willing to do so.

Christopher James, for the Plaintiffs:—

I rely on the words of the order, if a defendant chooses to rely on a defence not existing at the time of action brought, he can only do so on payment of costs if the plaintiff confesses the goodness of the defence. There is nothing special in the circumstances of this case to induce the Court to "otherwise order."

Cozens-Hardy, in reply.

NORTH, J.:—

I do not see my way to make the order asked for while the paragraph put in by way of further defence stands. If that is

(1) W. N. 1887, p. 156.

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put out of the way, it is a case in which I think I could "otherwise order." It is quite clear that by the further statement of defence it is not intended to waive the other defence set up in the original statement of defence. It is not a case in which the defendants admit that their first defence was wrong, and that they had set up for the first time a good statement of defence. It is quite clear the general order does contemplate that there may be circumstances under which it would be unfair and improper to make the defendant pay the costs when a further defence is put in of matters arising since the first defence was put in.

I do not think the Plaintiffs are entitled to have the costs of the action by entering judgment; on the other hand I do not think I ought to deprive the Plaintiffs of all benefit of signing judgment, and leave the Defendants the benefit of their further defence. I think the right thing is to say that neither the order for costs nor the further defence ought to stand. If Mr. *Cozens-Hardy* is right in saying that the point raised by the further defence was already raised, he will have the benefit of it when the time of trial comes. The right order is that, the Defendants, consenting that the further statement of defence be struck out, discharge the judgment.

I will reserve the costs of the further defence, the signing of judgment, and of this motion.

Solicitors for Defendants: *Foss & Ledsam.*
Solicitors for Plaintiffs: *Druces & Attlee.*

D. P.

BATES *v.* MOORE.

NORTH, J.

1888

March 24.

[1871 B. 184.]

Transfer out of Court—Petition or Summons—Costs—Fund exceeding £1000—*Title depending only on Proof of Identity and Birth of Applicant—Rules of Supreme Court,* 1883, *Order* LV., *r.* 2, *sub-r.* 1.

Where the title to a fund in Court depends only upon proof of the identity or the birth, marriage, or death of any person, the mere fact that the fund exceeds £1000 will not justify the making of an application for the payment or transfer of the fund out of Court by petition instead of by summons in Chambers.

In re Rhodes (1) commented on.

PETITION.

By an order made on the further consideration of this action on the 17th of July, 1872, it was ordered that one moiety of the residue of a sum of £8390 (after providing for certain payments thereby directed to be made) should be carried over to a separate account entitled, "The account of the infant Defendant, *Mary Elizabeth Moore.*" The moneys carried over to the credit of this account in obedience to the order were invested in 3 per cent. Consolidated Annuities, and the dividends thereon (subject to the payment thereout to the infant's father as directed by an order dated the 17th of February, 1873, of an allowance of £50 a year for her maintenance and education) were accumulated. When the petition was presented there was standing to the credit of the account a sum of £2849 6*s.* 11*d.* consols and a sum of £98 5*s.* cash. The infant attained twenty-one on the 28th of February, 1888. The petition was presented by her and her father, and it asked that out of the cash a sum of £6 17*s.* might be paid to the father in respect of the allowance for maintenance from the 10th of January, 1888, to the 28th of February, 1888, and that the residue of the cash and the consols might be respectively paid and transferred to *Mary Elizabeth Moore.*

The petition was not served on any one.

Dibdin, for the Petitioners:—

[NORTH, J.:—Why was not the application made by summons

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(1) 31 Ch. D. 499.

NORTH, J.
1888
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in Chambers, in accordance with rule 2, sub-rule 1 of Order LV. of the Rules of Supreme Court, 1883?]

It was thought right to present a petition because the amount is so large: *In re Rhodes* (1); *In re Broadwood* (2).

NORTH, J.:—

I can see no reason why this application should not have been made by summons. It ought not to have been made by petition. In any case of real difficulty I should allow the costs of a petition, even if the application might have been made by summons. But I do not think the mere fact that the fund exceeds £1000 is sufficient to justify the presentation of a petition. Rule 2, sub-rule 1, of Order LV. prescribes no limit of amount in a case where the title to the fund "depends only upon proof of the identity or the birth, marriage, or death, of any person." I do not think that in *In re Rhodes* Mr. Justice *Pearson* intended to decide that a petition could properly be presented in every case in which the fund exceeds £1000; if he did, I do not agree with him. The report of *In re Rhodes* shews that the title to the account in that case must have been entirely different from that of the account in the present case. Under the circumstances, however, the fund belonging to the Petitioner, I will allow the costs of the petition.

Solicitors: *Bridges, Sawtell, & Co.*

(1) 31 Ch. D. 499.

(2) 55 L. J. (Ch.) 646.

W. L. C.

NORTH, J.
1888
April 26.

In re FREWEN.
FREWEN *v.* JAMES.

[1884 F. 2072.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21, *sub-s.* 2—*Incumbrance affecting Inheritance—Mortgage—Term.*

The proceeds of settled land sold by the tenant for life under the *Settled Land Act*, 1882, can be applied in paying off a debt secured by a mortgage of a long term.

THIS was a summons by the tenant for life of settled land that a trustee in whose hands were the invested proceeds of the sale of part of the settled land might be ordered to raise and pay out of such proceeds a sum of £500 in part payment of a debt secured by a mortgage of part of the settled land for a term of 2000 years, and a sum of £9 9*s.* 4*d.*, mortgagees' costs, and the costs of the application. The land was settled by the will of *Thomas Frewen*, deceased. The mortgage was made by the trustees of a term of 2000 years created by the will to secure portions. £100 had been paid off. On account of the fall in rents the mortgagee required either a further sum of £500 to be paid off or a re-valuation. There was evidence that the sale of part of the estate subject to the mortgage would injuriously affect the rest of the estate.

The summons had been adjourned into Court for the purpose of arguing the question whether a mortgage of a long term was an incumbrance affecting the inheritance within the meaning of sect. 21, sub-s. 2, of the *Settled Land Act*, 1882.

Dauney, for the summons:—

The mortgage which it is now proposed to reduce is an incumbrance "affecting the inheritance" within the meaning of sect. 21, sub-s. 2, of the *Settled Land Act*, because otherwise the object of the Act to enable the tenant for life to make a clear title to the fee could not otherwise be considered.

Moreover, under the *Conveyancing and Law of Property Act*, 1881, s. 65, the term can be converted into a fee if the mortgagees sell; therefore the mortgage does, in fact, affect the inheritance.

Lloyd, for the trustee, relied on the words of the section.

NORTH, J.:—

I think the construction Mr. *Dauney* has contended for is the correct one, though I cannot say the question is wholly free from doubt. My difficulty is twofold: first, from the words of the section providing that the incumbrance to be paid off must be one affecting the inheritance or *other* the *whole* estate the subject of the settlement, whereas a mortgage of a term carved out of the inheritance is not on the whole estate; and secondly, because, if a mortgage for a term of years affects the inheritance, it must equally do so whether the term be long or short, and whether made to secure portions, jointure, or pin money; and it is difficult to see how an incumbrance in respect of pin money or a jointure secured by a term could properly be discharged out of capital money arising under the Act. But in the present case there are two reasons which induce me to come to the conclusion that the mortgage is a mortgage affecting the inheritance. One reason is because the mortgagee might foreclose, and if he did, he would have the power of acquiring the fee, as being possessed of a long term not subject to any equity of redemption; and if he did acquire the fee, I do not see how it could be said that his incumbrance was not one which did affect the inheritance. The second reason is that the tenant for life has power of selling the entire fee free from incumbrances, and unless this incumbrance is one which can be paid off, I do not see how that can be done: and the object of the *Settled Land Act* is that as between the persons interested in the estate, on the one hand, and the purchaser of the estate on the other, the tenant for life is to have absolute power to bind everybody interested with him in the estate, and make a conveyance of the fee free from incumbrances.

On these grounds, though I do not think the section clear upon the point, I come to the conclusion that this is the meaning of it.

Solicitors for the tenant for life: *Collisson, Prichard, & Green.*

Solicitors for the trustee: *T. W. & T. B. Nelson.*

D. P.

GOSNELL *v.* BISHOP.

KEKEWICH, J.

1888

Jan. 18; *Feb.* 8.

[1886 G. 1865.]

Costs of Motion—Trial—Judgment.

On taxing costs under a judgment dismissing the action with costs, the costs of a motion by the Plaintiff which was adjourned or stood over to the hearing, and was then not brought on, would be included in the costs of the action.

THIS was a motion to vary minutes under the circumstances stated below.

Barber, Q.C., and *Macrory*, for the Defendants.

Warmington, Q.C., and *Swinfen Eady*, for the Plaintiff.

His Lordship directed the motion to stand over for the question to be submitted to the Taxing Masters, and the following statement was laid before them:—

"This was a patent case assigned to Mr. Justice *Chitty*. A motion for an injunction was made before that Judge, but not heard on the merits. Counsel's briefs are indorsed 'Motion to stand to trial.' Nothing was said about costs, and it is common ground that in fact nothing was done beyond adjourning the motion to the trial. No order was drawn up.

"The action was transferred to Mr. Justice *Kekewich* for trial; it came on before him in the Michaelmas sittings. In the result he gave judgment for the Defendants with costs on the higher scale. Counsel omitted to mention the motion. It was not alluded to, nor was anything said about the costs of the motion.

"On drawing up the order the Defendants asked the Registrar to specify the costs of the motion as included in the costs of the action. The Registrar refused, and a motion was then made on notice to vary the minutes in this particular.

"The Registrar, Mr. *Clowes*, suggests that, under the circumstances above stated, and without any direction to that effect in the order, the Taxing Master would allow the Defendants their

KEKEWICH, J.
1888
GOSNELL v. BISHOP.

costs of the motion, but this is questioned by counsel for the Defendants. If costs of a motion are expressly reserved they must of course be dealt with at the trial before the Taxing Master can allow them. The question is whether the same rule applies where the order on motion, or counsel's briefs which take its place, are silent on the point.

"Mr. Justice *Kekewich* requests the Taxing Masters of the Chancery Division to give him their assistance in determining this point of practice, which is one of some importance, and to certify to him the result of their consideration."

To this the following certificate, signed by seven Taxing Masters, was returned:—

"We have considered the question upon which Mr. Justice *Kekewich* has desired our opinion. We should, in taxing costs under a judgment dismissing the Plaintiff's action, allow the Defendant the costs of a motion of the Plaintiff's which was adjourned or stood over to the hearing but not brought on."

Feb. 8. 1888. KEKEWICH, J.:—

This application involves a small but important question of practice, occurring as it does somewhat frequently.

The action relates to the alleged infringement of a patent, and was attached to Mr. Justice *Chitty's* branch of the Court. In the course of the proceedings the Plaintiff moved for an interim injunction. The case, however, was not then discussed upon the merits, and the motion was ordered to stand over until the trial of the action. No order was drawn up, but counsel's briefs were indorsed to that effect. The action was subsequently transferred to myself for trial, and at the trial judgment was given in favour of the Defendants with costs. Nothing was then said about the motion; and on drawing up the judgment a difficulty was raised as to the costs of the motion, and a special application has now been made by the Defendants that these costs should be specifically included in the costs awarded at the trial. Counsel for the Plaintiff objected that the costs should have been asked for at the trial, and that it was now too late for the Defendants to procure an alteration in the minutes. I have thought it right

KEKEWICH, J.

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GOSNELL v. BISHOP.

to consult the Taxing Masters of the Chancery Division, and, in answer to my question submitted to them upon a written statement of facts, seven of them have signed a certificate as follows :—[His Lordship then read the certificate.] The result is that according to the practice of the Taxing Masters a judgment dismissing an action with costs carries the costs of a motion by the Plaintiff which stood over until the trial, and was not then brought on. So that the Defendants' present application is unnecessary, and therefore wrong; but the Plaintiff, on the other hand, was also wrong in contending that the Defendants were not entitled to the costs which they claimed. On this motion I make no order.

Solicitor for Plaintiff: *H. C. Gosnell.*
Solicitor for Defendants: *E. W. Parkes.*

C. M.

C. A.
1888
March 22, 23, 24, 26, 27; May 1.

WILLIAMS *v.* COLONIAL BANK.

[1884 W. 677.]

WILLIAMS *v.* LONDON CHARTERED BANK OF AUSTRALIA.

[1884 W. 696.]

Shares—Pledge of Certificates—Blank Indorsement—Brokers—American Law—Mercantile Usage—Defective Title.

The English executors of an English holder of shares in an American railroad, in order that the shares might be registered in their names so as to enable them to receive the dividends, and if necessary to sell, signed blank transfers with powers of attorney indorsed on the share certificates and gave them to their brokers in *London*. The brokers fraudulently deposited them with a *London* bank as security for advances made to themselves, and afterwards became bankrupt. According to American law the certificates were not negotiable instruments, but the rightful holder of them with the indorsed transfers signed was entitled to be registered as holder. By the practice of the railway company it was required that the signatures of executors to an indorsement should be attested by a consul, which had not been done, and without this they were not regarded on the *Stock Exchange* as duly indorsed, though the want of this attestation would not prevent registration if the company were satisfied otherwise of the genuineness of the signatures. There was some evidence that under the circumstances of the present case the bank would in *America* have been held entitled to be registered, on the ground that the executors had estopped themselves from disputing the titles of the holders of the certificates:—

Held, by *Kekewich*, J., and by the Court of Appeal, that as the question whether the bank was to be deemed rightfully in possession of the certificates turned upon transactions in *England* it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law:

Held, by *Kekewich*, J., that the executors when they signed the certificates and gave them to the brokers enabled, and must be taken to have intended to enable, them to represent to any one whom it concerned that the executors had given the brokers authority to dispose of the shares in whatever manner was required, and that the executors were estopped from disputing the authority of the brokers to pledge the shares:

Held, on appeal, that as the certificates did not represent on the face of them that the person in possession of them would be entitled to the shares, and the absence of attestation by a consul made the transfer not in order, and was sufficient to put a party dealing with the brokers on inquiry, the executors were not estopped, and must be held entitled to the shares as part of their testator's estate.

THESE were appeals by the Plaintiffs, the executors of *J. M. Williams*, in two actions, one brought against the *Colonial Bank*, and the other against the *Chartered Bank of Australia*, from judgments of Mr. Justice *Kekewich* dismissing the actions (1).

J. M. Williams was at his death the registered holder of 1210 shares in the *New York Central and Hudson River Railroad Company*, for which he held 121 certificates, each of which was in the following form:—

"*J. M. Williams*, of ——, is entitled to 10 shares of 100 dollars each in the capital stock of the *New York Central and Hudson River Railroad Company*, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon, and in the form and manner which may at the time be required by the transfer regulations of the company. This certificate, however, is to be of no effect or validity until countersigned by the transfer agent and also by the registrar of transfers of the said company in the city of *New York*. In witness, &c."

Indorsed on each of the certificates was the following form:—

"For value received —— do hereby sell, assign and transfer to —— —— shares of the capital stock of the *New York Central and Hudson River Railroad Company* of 100 dollars each standing in —— name —— on the books of the company and represented by the within certificate ——. And do hereby irrevocably constitute and appoint —— attorney to execute a surrender and cancellation of the within certificate, and also to do all things requisite to transfer the said stock on the books of the said company in such form and manner as may be necessary or be required by the regulations of the said company in that behalf, with full power of substitution in the premises."

J. M. Williams died in 1880, having appointed four executors, two of whom proved in March, 1880, and a third in October, 1882.

In August, 1880, the two executors who had proved wished to get the shares registered in their names that they might be able to receive the dividends, and, if they thought fit, sell the shares. For this purpose they handed the certificates to the testator's brokers and signed the indorsements on them, leaving the blanks not filled up. In February and April, 1881, *Blakeway*, a member

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(1) 36 Ch. D. 659.

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of the firm of brokers, deposited the certificates with the *Colonial Bank* to secure moneys due to them from his firm. In December, 1882, the executors made inquiries as to the shares, and were informed by the brokers that the certificates had been sent to *New York* for alteration and were left there pending instructions from the executors if they desired a sale. In August, 1883, the *Colonial Bank* gave up fifty of the certificates, and *Blakeway* deposited them with the *London Chartered Bank of Australia* as security for moneys due from his firm. In 1884 the brokers became bankrupt, and the executors discovered that the certificates were in the hands of the banks. The banks insisted that they had good securities on the shares.

The executors then commenced these actions against the banks, claiming in each a declaration that the deposit of the certificates was made in fraud of the Plaintiffs, and conferred no title in respect of the shares represented by them; delivery of the certificates to the Plaintiffs; and an injunction to restrain the bank from applying for alteration in the register of the railroad company, and from dealing with the certificates or the shares.

The evidence shewed that according to American law a person to whom the certificates of shares were delivered by the registered holder with the indorsed transfers signed by him, was treated as legal owner of the shares as between him and the registered holder, and was entitled to fill up the blanks in the transfers, and have the shares registered in his name. Certificates thus indorsed in blank were treated on the *Stock Exchange* very much as if they were negotiable instruments. The regulations of the railway company required that the signatures of executors to a transfer should be attested by a consul, but this was not a condition precedent to registration, which could be obtained if the company was otherwise satisfied of the genuineness of the signatures. It was shewn, however, that according to the practice of the *Stock Exchange* a transfer by executors without attestation by a consul was not in proper form, and would not generally be accepted. The evidence went to shew that according to American law if certificates with the indorsed transfers signed were stolen from the shareholder without any negligence on his part, the thief would not be able to make a good title to the shares, but that in the present case the executors having handed to the brokers the certificates with signed transfers would be estopped from disputing the title of the persons to whom the brokers made them over.

Kekewich, J., held that the executors had so acted that they could not dispute the title of persons to whom the brokers pledged the shares, and he therefore dismissed the actions. The Plaintiffs appealed.

Sir *H. Davey*, Q.C., *Warmington*, Q.C., and *Decimus Sturges*, for the Plaintiffs :—

The first proposition of the Defendants is that these indorsed certificates are negotiable instruments. There are two criteria of negotiability—first, that there is an instrument transferable from hand to hand by delivery; and, secondly, that the instrument is of such a character that the full benefit of the property or contract of which it is the symbol vests at once in the transferee as fully as it was in the transferor. Thus a bill of exchange is completely negotiable; the indorsement and delivery of it pass a title to the indorsee. So a bill of lading passes a right to the goods. But here the document states that *A. B.* is the holder of a certain number of shares, and that they are transferable only by proper proceedings in the company's office. Now what is a share? It is a right to receive an aliquot share of the profits of the company and to attend and vote at meetings. It cannot be said that the handing over the certificate, though indorsed, passes the property in the share. The only person who can receive profits and attend meetings is the person who is registered at *New York* as holder; and this is not altered by the fact that by the custom of the *Stock Exchange* these documents are treated as transferable by delivery. Whether a document can be made negotiable by custom is a difficult question, on which there has been great difference of opinion, but assuming that it can, we say that no such custom is proved in the present case. Now what was the effect of the indorsement? At most an authority to a person into whose hands the document might lawfully come to get himself registered. This falls far short of a negotiable instrument. It is needless to go through the whole chain of cases as to negotiable instruments, but one or two recent authorities may be usefully referred to. In *Picker* v. *London and County Banking Company* (1) it was held that documents which were negotiable according to foreign law were not to be treated as negotiable here so as to enable a thief to give a good title to them unless by custom in this country they were treated as negotiable. The observations of Lord *Esher* in his judgment are very important. In *London and County Banking Company* v. *London and River Plate Bank* (2) there was a contest between two banks as to the title to *Pennsylvanian Railway* shares which had been stolen, and it was held that the question as to the negotiability of an instrument was whether "the legal title to the property secured thereby passes from one man to another by the delivery thereof." That decision is not binding on this Court; but we submit that the Court will take the same view of the law. Some of the Defendant's witnesses assimilated this case to that of bonds payable to bearer, but the analogy fails. A transferor of such a bond retains no interest; here the transferor clearly does retain an interest. *Dixon* v. *Bovill* (3) and *Crouch* v. *Crédit Foncier* (4) are against documents being made negotiable by custom, but that question need not be pursued, having regard to the state of the evidence. Now, if the documents are not negotiable, a person who acquires a title to them through a fraud, though not his own, cannot have a good title unless there be estoppel. There is nothing here that can be contended to create an estoppel unless the signing the transfers in blank and handing them to *Thomas* did so. But in the case of documents like these, that did not amount to a representation by the Plaintiffs that if *Thomas* filled up the indorsements with the names of the banks, the banks would get a good title to the shares. The banks rely on *Goodwin* v. *Robarts* (5) and *Rumball* v. *Metropolitan Bank* (6), but in each of those cases the documents purported to be payable to bearer. Now what effect can you give to an indorsement in blank? It cannot be put higher than this, that it gives authority to any person who becomes legally entitled to the document to fill up the blank. But in order that there may be an estoppel there must be a representation that the holder will by delivery become entitled to the share. There is no such representation here, for the document states on the face of it that the right to the share can only be transferred in a particular way. There is no representation which prevents the owner from alleging his true title. The observations of Lord *Cairns* in *Goodwin* v. *Robarts* (1) are material; they shew the *ratio decidendi* in that case to have been that the scrip contained a representation on the face of it that all the rights it represented would pass to the holder by the delivery. Here the certificate states the contrary.

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(1) 18 Q. B. D. 515.
(2) 20 Q. B. D. 232.
(3) 3 Macq. 1.
(4) Law Rep. 8 Q. B. 374.
(5) 1 App. Cas. 476.
(6) 2 Q. B. D. 194.

[*Rigby*, Q.C.:—See the observations of Lord *Selborne* (2).]

Rumball v. *Metropolitan Bank* (3) goes on the same ground. In *Colonial Bank* v. *Hepworth* (4) the principle for which we contend is laid down—that no estoppel can be raised on a document which is inconsistent with the document itself. We say, then, that here there can be no title in the banks but a title by estoppel, and that estoppel is excluded by the documents themselves.

Thus far we have treated the case as if this had been an indorsement by the holder, but it is in fact an indorsement by his executors. Now the evidence shews that an indorsement by executors whose title has not been recognised by the company is not in order, unless accompanied by an official extract of the will and an attestation of the signatures by a vice-consul. If so, the case admits of no further argument. The banks must shew an absolute and unconditional right to be registered as shareholders, which, having regard to these irregularities, they cannot do, or an equitable title: *Société Générale de Paris* v. *Walker* (5); *Colonial Bank* v. *Whinney* (6). The evidence of the registrar of the company is clear that the company require the particulars we have mentioned; and the stockbrokers shew that, according to the practice of the American stock exchange, a transfer simply signed by executors without more would not be accepted by a

(1) 1 App. Cas. 476, 489.
(2) Ibid. 497.
(3) 2 Q. B. D. 194.
(4) 36 Ch. D. 36.
(5) 11 App. Cas. 20.
(6) Ibid. 426.

purchaser as sufficient. The evidence of the American lawyers, we submit, does not carry the case quite so far as Mr. Justice *Kekewich* has considered. They say that a thief who stole these documents could not give a good title to them. There is no distinction between the present case and that. *Blakeway* committed a crime under 24 & 25 Vict. c. 96, s. 3, and was in substance a thief. The American witnesses do certainly hold a title to be conferred in some cases, where it would not be conferred by English law, but they go on the doctrine of estoppel, which appears to be carried further in America than here. Whether an estoppel arises from these transactions in *England* so as to give a title to the certificates, is a question to be decided by English law, though the effect of a title to the certificates of American shares is a question of American law.

Rigby, Q.C., *Reid*, Q.C., and *C. James*, for the *Colonial Bank*, and *Latham*, Q.C., and *T. H. Wright*, for the *Chartered Bank*:—

The question is, who are the owners of the shares, and that is a question to be decided by American law; for a decision here which the American Courts would disregard would be nugatory. The Appellants, in dwelling on the questions of negotiability and estoppel, are avoiding the one point of the case—who according to American law are the owners of these American shares? The evidence of the American experts shews that according to that law, whether it agrees with the law of *England* or not, the holder of the certificate, when signed by the registered owner, is as between him and the rest of the world the legal and equitable owner of the shares, and (in the absence of questions such as the lien of the company, which do not exist here) can call upon the company to register him. This may have been founded on a law of estoppel which goes further than ours, but it is the settled law of *New York*. The attestation required to the signature of executors is a regulation made by the company for their own convenience, but it rests on no American statute, and the company would have no defence in *America* to an action to compel them to register the holder.

[COTTON, L.J.:—In the American evidence cases are referred to, but they do not shew that handing over the documents signed gave a title, they go on the ground that the holder was estopped from setting up his own title. That is not transfer.

[LINDLEY, L.J.:—The law of estoppel may be different in *America* from what it is here.]

That, it is submitted, makes no difference. The Courts of *New York* have laid down the rule that the bearer of one of these documents properly signed is entitled to registration. It is no matter on what ground they arrived at this conclusion. The American law must govern. We are in the same position as an English shareholder who has got a duly executed deed of transfer. Now as to estoppel, the Plaintiffs have sent out to the world these documents, signed in a way which makes a legal transfer, and though they are not strictly negotiable instruments, they stand on much the same footing as documents payable to bearer.

[THE COURT here referred to the decision of the House of Lords on the 12th of March, 1888, in *Earl Sheffield* v. *London Joint Stock Bank*, reversing the decision in S. C. *sub nom. Easton* v. *London Joint Stock Bank* (1) and to *France* v. *Clark* (2).]

Lord Sheffield's Case does not apply, for in that case the transaction was not in the ordinary course of business. So in *France* v. *Clark* the leaving blanks was unusual.

[BOWEN, L.J.:—Does not the fact of the transfer being in blank put you on inquiry?]

No; it being notorious that it was the practice to execute these transfers in blank: Exchequer bills are in blank; their being so only shews that they are on the market. The fact that *Blakeway* was a broker did not affect us with notice that he was improperly dealing with the shares. *Goodwin* v. *Robarts* (3) was the case of a broker. The brokers had power to deal with the certificates under the *Factors Acts*: see 5 & 6 Vict. c. 39, s. 1. The Plaintiffs are, as against the *Chartered Bank*, estopped by their delay. If they had taken reasonable care, *Blakeway* would not have been able after such a length of time to pledge certificates to the *Chartered Bank*.

(1) 34 Ch. D. 95; 13 App. Cas. 333.
(2) 26 Ch. D. 257.
(3) 1 App. Cas. 476.

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Sir *H. Davey*, in reply, referred to *Rex* v. *Bank of England* (1); *MacNeil* v. *The Tenth National Bank* (2); *Shropshire Union Railways and Canal Company* v. *Reg.* (3); *Waldron* v. *Sloper* (4); *Pickard* v. *Sears* (5).

1888. May 1. COTTON, L.J.:—

These are two appeals, one in each action. Each action was brought by the executors of the late Mr. *Williams*, one against the *Colonial Bank*, and the other against the *Chartered Bank of Australia*. Each action was to prevent the Defendant bank from dealing with and claiming as its own certain shares in an American railway company, the *New York Central and Hudson River Railroad Company*.

Mr. *Williams* at the time of his death was the owner of 1210 shares in that company, which were standing in his name, and his executors shortly after his death desired that those shares should be transferred from the name of the testator into their own names in the books of the company. Those shares, in parcels of ten, were represented by certificates, and the executors sent those certificates to Messrs. *Thomas*, who were brokers in *London*, for the purpose of their getting the shares transferred into the names of the executors. At first they did not sign the power of attorney on the back of the certificates, the certificates were sent back to them, and the two executors who had then proved signed the power of attorney on the back of the certificates, leaving it in blank, not naming any attorney nor filling in the name of any one as the person to whom the shares were to be transferred. The shares were not transferred into the names of the executors, and a member of the firm of brokers used the certificates for his own purposes. At first he deposited the whole of them with the *Colonial Bank*, as a security for money due to them from his firm. In the year 1883, two years and a half after the certificates had been signed and left with the brokers, the brokers got some of these certificates back from the *Colonial Bank*, and the same member of the firm deposited them for an advance with the *Chartered Bank of Australia.* In 1884 the firm became bankrupt, and inquiries were made by the executors as to what had become of their certificates which they had left with the firm up to that time, and apparently without inquiry, except an inquiry made in December, 1882, when the fraudulent member of the firm told them that the certificates were quite safe in *America.* They found that these certificates were not in the possession of the brokers, but of the banks, and the banks claimed to be entitled to them according to American law. The Plaintiffs brought their actions to assert their title to the shares. At the time when the actions were commenced the shares were still standing in the name of the testator, and the certificates were in the same state as when handed to *Thomas & Co.* Mr. Justice *Kekewich* decided in favour of the Defendants, and dismissed both actions. The question before us is, was he right in so deciding?

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(1) 1 Doug. 524, 527.
(2) 46 N. Y. Rep. 325.
(3) Law Rep. 7 H. L. 496.
(4) 1 Drew. 193.
(5) 6 Ad. & E. 469.

I will first say a few words as to the nature of these certificates. On the face of them each is a certificate that Mr. *Williams* was entitled to ten shares of $100 each in the capital stock of the railroad company, transferable in person or by attorney in the books of the company only on the surrender and cancellation of this certificate by an indorsement thereof hereon in the form and manner prescribed by the regulations of the company. Then on the back there was this:—[His Lordship read the indorsement.] The two executors who had proved signed these indorsements, leaving the names of the transferee and of the attorney in blank. The banks contend that, according to American law, and by the delivery of these certificates with signed transfers upon them, they became entitled both at law and in equity to the shares which are represented in the certificates as belonging to the testator; and that as the means were given to them of requiring a transfer by the company of the shares into the name of the transferee, though as against the company they cannot be considered as having the rights of shareholders till their names are entered in the books of the company, yet as between transferor and transferee they have both the legal and equitable title. According to English law of course they would have no legal title. They would have a mere inchoate title, which according to

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English law would not enable the transferees to hold the shares as against the executors who are the legal owners, but it appears that according to American law the transferee has not only an equitable title but a legal title to the shares.

We need not, however, in my opinion, consider how far we ought in *England* to give effect to the transfer as constituting a good legal title to the shares as against the executors of the testator, because, as I understand the evidence of the American lawyers, these certificates, with signed transfers indorsed, are not, and neither Mr. *Rigby* nor Mr. *Latham* contended that they were, negotiable instruments. I find from the evidence of the American lawyers that although, in their opinion, persons in the position of Messrs. *Thomas*, who had in fraud of their client parted with these certificates, could give a good title by so doing, yet, as I read their evidence, the title of the transferee to the shares depends on his having obtained a good title to the certificates. I will read some of the questions put to Mr. *Carter*, one of these witnesses, and his answers: *Q.* "Suppose that these certificates in question here had been indorsed by the executors, as they now purport to be, and placed in the safe of the executors, which was as secure as ordinary safes are supposed to be, and locked up, and that thereafter, and without any neglect or co-operation on the part of the executors or either of them, the safe had been blown open and the certificates taken by a thief and by him pledged or sold to a *bonâ fide* holder without notice, is it your opinion that such *bonâ fide* holder could hold such certificates as against the executors?"—*A.* "That is not my opinion. I should be of a contrary opinion." *Q.* "Please state why the theft from the executor would change your opinion from that which you expressed when the theft was from the specific legatee?"—*A.* "The interrogatory assumes that in the case before put to me there was a theft from the specific legatee, which I do not agree to, but if I am asked simply for the difference between the cases it is this—certificates of stock are not negotiable instruments. Consequently a thief who has obtained one which happens to have upon it a transfer and power of attorney signed in blank in a regular manner cannot even then transmit a title. The foundation of the title of a *bonâ fide* purchaser for value of a certificate of stock which has been delivered to him in fraud of the rights of the registered owner rests upon the circumstance that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe honestly that he was taking a good title to it. In other words the foundation rests in the principle of estoppel." So he considers that where there is an estoppel as against the real owner then a good title to the certificate would be given, but where there is an actual theft and nothing done by the owner of the certificates to induce a belief that the transferee would get a good title, then the transferee would have no good title to the certificate nor consequently to the shares. Now the question here whether *Thomas & Co.* gave the banks a good title to the certificates depends on transactions in *England*, and must be decided by the law of *England* and not by the law of *America*. The law of *America*, in my opinion, is properly referred to for the purpose of deciding what would be the effect of a valid effectual transfer of the certificates on the title to shares in an American company, but whether *Thomas & Co.* transferred to the banks a good title to the certificates depends on transactions in *England*, and in no way depends on the law of *America*. So also the question whether the Plaintiffs have been estopped by any act of theirs from questioning the title of the transferees of *Thomas & Co.* must be a question of English law.

We have, then, to consider whether, under the circumstances of this case, *Thomas & Co.* could transfer to the banks a good title to the certificates. It is unnecessary to refer to authorities in English law to shew that no one can transfer a better title than that which he possesses to a chattel or to an instrument which is not negotiable. It is true, indeed, that by the English law the real owner may estop himself by conduct or representation from questioning the title of the transferee who honestly takes from a dishonest holder, but the general law is quite clear. In *Cole* v. *North Western Bank* (1) Lord *Blackburn* says (2): "At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had." Then he goes into the question of market overt

(1) Law Rep. 10 C. P. 354.
(2) Law Rep. 10 C. P. 362.

and other matters which are not material for the present purpose.

In the present case the transfers to the banks were in fraud of the duty of the brokers, who had no title to these certificates, but held them only for the executors. It is true, and this was relied upon, that the executors did think that they might at some time desire to sell these shares through the brokers, but they never in fact had given them any instructions to sell, or to do anything else than to get the shares transferred into the names of the executors. The brokers therefore had no title which they could transfer to the banks.

The only question, then, which we have to consider is this—are the Plaintiffs estopped from questioning the title of the banks which they obtained through the fraud of *Blakeway*. It is a serious question whether, having regard to the character of these documents, there could be an estoppel. If there had been a representation on the face of them that the holder of them would be entitled to the shares, that would estop the executors from asserting a title as against the holder of the certificates, because a certificate if it were in that form would be a representation made by the executors to every person into whose hands it came that the bearer would become by merely having this document in his possession entitled to the shares. But there is nothing of that kind on these certificates. On the contrary each certificate on the face of it represents that the shares can be transferred only in the books of the company and in a particular way. Then at the back of it there is a form of transfer to a person to be named, and an attorney is to be named in order to give effect to the transfer. There is nothing therefore which can be anything like the representation which there would be on a document purporting to give the holder of it a title to the shares to which it relates.

We must consider the circumstances under which the transfer was made for the purpose of determining whether these banks are entitled to say to the executors: "By your conduct you induced me to believe that I could get a good title to these shares by taking the certificates from your agent." The Appellants relied much upon the fact that though these documents were signed by the two executors who had proved they were not signed before a consul, and that therefore the transfer was not in order. It was indeed in evidence that, though the powers of attorney were not so signed, if when they were taken to *America* it was proved to the satisfaction of the officers of the company that the signatures were those of the executors it would be sufficient, and effect would be given to the transfer. But that is not the question which we have to consider. In my opinion the Defendants cannot rely on estoppel as against the Plaintiffs asserting their real title if there was anything in the way in which they took these certificates which makes their taking them not the act of a reasonable man reasonably dealing with matters of business. If parties will without inquiry take documents which have on their face anything to put the takers on inquiry, they take them at their own risk, and if those from whom they take the documents have not a good title which they can transfer, then the transferees do not acquire a good title, although at the time when they take the documents they do not in fact know of the real title of those who now assert it. There was a mass of evidence with regard to the practice in *England* as to these transfers, and in my opinion it comes to this, that if there was a signature only in this form not attested by a consul the documents would not according to the ordinary course of the *Stock Exchange* be taken as transfers. It appears that some persons in business on the *Stock Exchange* pay no regard to such a defect, but upon the whole of the evidence an absence of attestation before a consul would make the documents "not in order," and in my opinion would put any one dealing with them on inquiry as to the circumstances under which they were brought to him. The case is within the observations of Lord *Selborne* in *Société Générale de Paris* v. *Walker* (1), where it was held that the effect of the absence of a certificate of English shares was to put parties on inquiry, and if there was an absence of that certificate, although there was a transfer of the shares duly executed, those who took it without the certificate took it under such circumstances that they could not be said to take it as purchasers for value without notice. In my opinion, although if it had been proved in *America* that in fact the signature was that of the executors the absence of the consul's attestation would have no effect, yet its absence was enough to put those who took these certificates on inquiry, and as they took them without inquiry they are not entitled to say that the Plaintiffs are estopped by any conduct of theirs from asserting their real title.

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(1) 11 App. Cas. 20.

Before I part with the case I ought to notice the point raised on behalf of the *Chartered Bank*. The *Chartered Bank* took some of these certificates a long time after the executors had signed them, and they contended that the negligence of the executors in leaving these certificates in the hands of their brokers was such as to prevent the executors from asserting their real title. But there was no negligence at all in the first instance in leaving these certificates in the hands of the brokers; they were brokers whom the executors had no reason to distrust, and whom they did trust, and brokers are persons with whom such documents can be reasonably left as persons who are to have the care and custody of them under the direction of their principals. We find that in December, 1882, the executors did make inquiries of *Thomas & Co.*, and were told that the certificates had been sent to *New York* for alteration and were left there pending instructions from the Plaintiffs in case they required a sale. The executors might require a sale, and although they had not directed the brokers to do anything during the time in question, except to get the shares transferred into the names of the executors, there was no negligence attributable to the executors in leaving these certificates so long in the hands of their brokers. In my opinion the two sets of Defendants must stand on the same footing, and the Plaintiffs are entitled as against each of them to claim these shares as part of the estate of the testator.

I may also mention (to shew that I have not overlooked it) that there was an attempt by one of these banks to get the shares transferred into their names or into the names of their nominees. That was refused by the authorities of the railway company, and apparently in consequence of the irregularity in the signature of the executors to these documents.

In my opinion the decision of Mr. Justice *Kekewich* must be reversed, and the Plaintiffs are entitled to the decree for which they ask.

LINDLEY, L.J.:—

I am of the same opinion, and were it not that all cases of this kind are of the greatest importance, I do not know that I should consider it necessary to say anything, but when we have to decide which of two innocent people is to suffer from the fraud of a third it is necessary to be very careful and to take great pains to assure ourselves that the party against whom we decide is, according to law, in the wrong.

First of all, let me dispose of the questions as to American law. As I understand the evidence given by the American lawyers, if this transaction had taken place in *America* the banks would have got a good title to these shares, subject possibly to the question about the documents not being properly attested. I doubt very much whether the American lawyers would have attached much importance to that, and I shall assume throughout my judgment that if this transaction had taken place in *America* the banks would have succeeded. Now, the American law is important up to a certain point, but not beyond that point. We must look to the American law for the purpose of understanding the constitution of the railway company and the proper mode of becoming a shareholder in it. Moreover, it may be that the consequences of having acquired a title to the certificate may depend on American law, but the question how a title is to be acquired to a certificate by a transaction in this country does not depend on American law at all. One question, and to my mind the main question, resolves itself into this—who is entitled to these certificates? Now the certificates have been dealt with by the executors in *England*, and the certificates are chattels, and when we are considering who is entitled to a chattel bought or sold or pledged in *England*, it is English law and not American law that is to govern the case.

Now, can it be said that these banks have acquired by English law a title to these certificates? If so, how have they got it? Assume for the moment that in *America* certificates indorsed like these are treated as negotiable instruments, that would not make them negotiable instruments in this country. That was decided by *Picker* v. *London and County Banking Company* (1), but authority is hardly wanted for so very obvious a proposition. A Prussian thaler is current in *Prussia*, but it is not current in *London*; nor, because a negotiable instrument is current in one country and part of the cash of that country, is it therefore a negotiable instrument or part of the cash of *England*. Therefore assuming (which, however, is not the fact) that these documents would be treated as negotiable instruments in *America*, they cannot be treated so here unless it is by virtue of English law. Before I proceed further I will refer to a passage in the judgment of Lord *Blackburn* in *Cole* v. *North Western Bank* (2). That is one of the leading cases and one of the most instructive cases I know, about the transfer of goods and the effect of transactions in this country. Lord *Blackburn*, after reviewing a variety of cases, sums up the general law in this way: "The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can shew that he was misled by the act of the true owner. The Legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled anyone who *bonâ fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the Act, we think they have not used language sufficient to express an intention so to enact." And just before he said, "We do not think that the Legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done."

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(1) 18 Q. B. D. 515.

(2) Law Rep. 10 C. P. 354, 372.

Observations to the same effect in somewhat different language will be found in the more recent case of *City Bank* v. *Barrow* (1) but I need not stay to read them.

Bearing that in mind, let us see how, apart from the doctrine of estoppel, the executors can have lost the property in these certificates. Treat this as an action of detinue or trover for the certificates in the hands of the bank. What is the defence? I cannot see any defence. How do the banks put it? It is plain that they are not purchasers in market overt. In the first place, they are not purchasers at all. They are pledgees, and the doctrine of market overt has no application to pledges, but only to sales. Apart from that, there is no market overt that I know of for property of this description. Had *Thomas & Co.* authority to transfer these certificates as they did? Clearly not. They had no authority to do anything of the kind. The banks, therefore, appear to me to be absolutely devoid of defence to an action of detinue or trover brought by the executors for the recovery of these certificates looking at them as chattels.

Let us see if they can make any defence on the ground of estoppel. What have the executors done? What is it they are estopped from denying? What representation have they made, and what representation are they precluded from denying or explaining away? Look at one of the certificates, what they have done is this, they have signed in blank the indorsement on that certificate. Let us see what it says. Whom do they represent as the owners of these certificates? Is it anybody who gets them? The language of the documents is not to that effect. The certificate states that *John Michael Williams* is the registered owner, which he was. That is true, and no question of estoppel arises as to it. Then persons who state themselves to be his executors (which is true) sign a document which runs thus: "for value received —— do hereby sell, sign, and transfer to —— —— shares in the capital stock," &c., and then they irrevocably appoint —— attorney to do all things necessary to transfer the shares. To whom is all that applicable? I cannot read the document otherwise than as confining all that to the person who is entitled to the certificate. The certificate is transferable to bearer; so is a horse, so is a book, provided the transferor is the owner and is entitled to transfer it. I understand this document as representing in truth that the person entitled to the certificate by transfer, not the mere holder, not the thief, not the person taking from him even *boná fide* for value without notice, but whoever acquires a title to the certificate is entitled to fill up the blanks and get registered as the holder. That is how I understand the document, and I cannot force the language further so as to hold that these executors have, by putting that document into the hands of *Thomas & Co.*, estopped themselves from denying the title of the persons taking from *Thomas & Co.* by way of pledge. Now when we look at what the evidence is, it may be that the American law of estoppel goes further than ours, it may be that if this transacaction had occurred in *America* the American Courts would have said: "You the executors, having handed over the certificate with this indorsement signed by you, are estopped from denying the title of any *boná fide* holder for value of the certificate." I much doubt, however, whether the American law goes further than this, that the person entitled to the certificate is entitled to fill up that power of attorney and to get the shares.

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(1) 5 App. Cas. 664, 677.

If we look from the document itself to the authorities which bear more or less upon this subject, it appears to me that they all support the view which I am taking. The observations in *France* v. *Clark* (1), in a considered judgment of Lord *Selborne*, the observations of Mr. Justice *Chitty* in the *Colonial Bank* v. *Hepworth* (2), and the judgment of Mr. Justice *Manisty* in *London and County Banking Company* v. *London and River Plate Bank* (3) are all in the same direction. Mr. Justice *Chitty's* judgment in *Colonial Bank* v. *Hepworth* appears to me to deserve particular attention. After referring to *Goodwin* v. *Robarts* (4), and the language of Lord *Selborne* in *Sociéte Générale de Paris* v. *Walker* (5), he says (6): "Estoppels cannot be manufactured arbitrarily; no estoppel can be raised on a document inconsistent with the terms of the document itself. What, then, is the estoppel here? Having regard to the practice proved, and the condition in which these documents are when they pass from hand to hand, the right principle to adopt with reference to them is to hold that where (as is the case before me) the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the *bonâ fide* holder for value of the certificates for the time being an authority to fill in the name of the transferee and is estopped from denying such authority; and to this extent, and in this manner, but not further, is estopped from denying the title of such holder for the time being." Now, if Mr. Justice *Chitty* means by the expression *bonâ fide* holder for value of the certificates somebody distinguishable from the person entitled to the certificates, I doubt whether he is not putting it a little too far, a little further than the language of the document warrants; but if, as I understand it, he means by *bonâ fide* holder the person entitled to the certificate, then I think that is perfectly correct. Even, therefore, if these documents had been in order I should have felt extreme difficulty, if not impossibility, in upholding the title of the banks.

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(1) 26 Ch. D. 257.
(2) 36 Ch. D. 36.
(3) 20 Q. B. D. 232.
(4) 1 App. Cas. 476.
(5) 11 App. Cas. 29.
(6) 36 Ch. D. 53.

But when we look further, and when we find that these documents are not in order, by which I mean that they are not in the shape in which mercantile men will take them without inquiry, it appears to me that the case of the banks completely collapses: they have no title to the certificates except on the ground of an estoppel, and how can they avail themselves of estoppel when they are put upon inquiry by the very document upon which they rely? Mr. *Rigby* made a very forcible observation in the course of his argument to the effect that the fact that these documents are not in order is utterly immaterial, as it would have no further effect than to cause delay. That is true if you are dealing with a case where the holders have a good title to the certificates. If these banks had acquired such a good title it would merely cause delay until the banks could satisfy the railway company that the transferors were executors and that their signatures were genuine. But estoppel is a totally different thing. The banks have no title to the certificates by transfer from their owner. When they say they have been misled by the document the answer is, "the document put you upon inquiry; if you had inquired in the proper quarter you would not have advanced your money and would not have been deceived by *Blakeway*." For these reasons it appears to me that neither by title nor by estoppel, nor in any other way, can the bankers hold these certificates.

As to the *Factors Acts,* those Acts, as I understand them, do not apply. In the first place, I do not know that there is any decision to the effect that documents of this kind are goods and chattels within the *Factors Act,* and there is a decision to the contrary, *Freeman* v. *Appleyard* (1). But, apart from that, a conclusive answer to the argument founded on the *Factors Acts* is that *Cole* v. *North Western Bank* (2) shews that these documents were not entrusted to *Thomas & Co.* within the meaning of those Acts.

BOWEN, L.J.:—

I am of the same opinion, and as my judgment proceeds precisely upon the same lines as those of the Lords Justices who preceded me, I will only say a few words, in deference to our practice when we differ from the Judge below.

The main question in these actions does not appear to me to be a question of American law; we have not primarily to consider what according to American law would be the condition, as regards the right to be registered, of the person who holds these certificates. What the American law would say on that subject may be accidentally important when we come to the question of estoppel, but it is not the primary question. The key to this case is whether the Defendants have a right to hold these pieces of paper, these certificates. What the effect upon their ulterior rights in *America* would be, if we were to declare that they were entitled to these pieces of paper, is another question. Now, how have the Plaintiffs lost their right to these certificates? It is admitted that the certificates are not negotiable instruments according to English law. The Defendants' counsel practically confessed that they did not claim them as negotiable instruments. Whether or no they are negotiable instruments according to American law is unimportant if they are not negotiable instruments according to our own. How, then, can it be said that

(1) 32 L. J. (Ex.) 175.

(2) Law Rep. 10 C. P. 354.

the executors have lost their title to these certificates? Only conceivably on the suggestion of estoppel. The broad principle of the law, as has been pointed out by the Lord Justice *Cotton*, and at greater length by the Lord Justice *Lindley*, is, that except in the case of sale in market overt a person does not acquire a title to a personal chattel from anybody except the true owner. That is the general rule, but in this particular case it is suggested that the executors so conducted themselves as to preclude themselves from now maintaining as against the Defendants that they have a title. It is, therefore, estoppel or nothing; and the estoppel must be found, if anywhere, in some express or implied representation, or, what perhaps comes to the same thing, negligent conduct which amounts to such a representation. In regard to representation, these documents on the face of them nowhere suggest that the bearer will become entitled to the shares. Taking the documents and the American law together (for what the situation in *America* would be of the person who holds the certificate is a matter which can for this purpose be taken into consideration), the outside of the representation made seems to me to be that the person who is entitled to the certificate will be entitled to fill up the indorsements and get the transfer registered. I do not think it goes further than that, but in this particular case the documents are not in order, and although I agree with Mr. *Rigby* that their being out of order as regards the attestation would be treated as a matter of no substantial consequence in *America* when the title came to be considered with a view to registration, I do not think it is immaterial when you are considering the question of estoppel, or of what it would be reasonable for a person taking the documents to do before he acted upon the faith of any representation he supposed to be made by them, or by the conduct of those who placed them in the hands of an agent, and so of the holder for the time being. When you come to consider that, it seems to me that the imperfection of the documents put upon inquiry the persons who took them in this country. As for the suggestion that there has been negligence, I can see no ground for any such idea. You cannot extract negligence from the mere intrusting an agent of your own in the ordinary course of business with a document for the purpose

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of his doing what is required in nine cases out of ten to be done by an agent.

On these grounds, which are substantially the same as those of the Lord Justice *Cotton* and the Lord Justice *Lindley*, I think the judgment below must be reversed, and I will only add that I think it is possible that the learned Judge below was misled by trying to follow the judgment of this Court in *Easton* v. *London Joint Stock Bank* (1). I do not say it was right of him to follow it, for I do not think it governs this case, but I think he was trying to follow it. That judgment has ceased to be a binding authority in consequence of the different view taken by the House of Lords (2).

Solicitors for Appellants: *Young, Jones, & Co.*
Solicitors for *Colonial Bank*: *Druces & Attlee.*
Solicitors for *Chartered Bank*: *Freshfields & Williams.*

H. C. J.

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1888
May 2.

SPEDDING *v.* FITZPATRICK.

[1887. S. 4578.]

Practice—Highway—Particulars.

In an action to restrain trespass on a road, the Defendants pleaded that it was a highway, and were ordered to amend their defence so as to shew the mode or title in or under which they claimed that the road had become a highway. The Defendants amended by alleging that the road had for many years been used by the public as of right and was a highway, having been dedicated to the public by the Plaintiff and her predecessors in title or some of them. *Kay*, J., on the application of the Plaintiff, then made an order that the Defendants should deliver to the Plaintiff full particulars of the nature of all acts of dedication relied on by the Defendants, and if the Defendants claimed by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, and by whom made. The Defendants appealed:—

Held, that under the present system the Court will oblige a party to give such information as to the nature of his case as is requisite to prevent his opponent from being taken by surprise at the trial, but that the order made went too far, and that the proper order was that if the Defendants relied on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made.

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(1) 34 Ch. D. 95.

(2) 13 App. Cas. 333.

THIS was an action by the owner of an estate near *Keswick*, claiming an injunction to prevent the Defendants from trespassing upon parcels of land belonging to the Plaintiff, forming part of a hill called *Latrigg*, and from trespassing over an occupation road called the *Lower* or *Terrace Road*, at the foot of the hill.

The Defendants by their defence alleged as follows:—

"From the road known as *Spooney Green Lane*, in the statement of claim referred to, or the continuation thereof, there runs a road called *Calvert's Road* to the top of the hill called *Latrigg*. The said road called *Calvert's Road*, and the *Lower* or *Terrace Road* in the statement of claim referred to, have for very many years past been used continuously by the public as of right as foot and horse ways, and the said roads are in fact highways. The Defendants have recently asserted and set-up, and they still assert and set-up, the right of the public to use the said roads called *Calvert's Road* and *Lower* or *Terrace Road* as foot and horse ways."

On the 9th of February, 1888, Mr. Justice *Kay* made an order "that the statement of defence delivered in this action be amended so as to shew with reasonable certainty the course and terminations of the alleged road in the said statement of defence called *Calvert's Road*, and also the mode or title in or under which the Defendants claim that both the roads mentioned in paragraph 2 of the said statement of defence have become or are highways."

Pursuant to this order, the Defendants delivered an amended statement of defence, the first paragraph of which was as follows:

"From the road known as *Spooney Green Lane* in the statement of claim referred to, or the continuation thereof, there runs a road called *Calvert's Road* from a point about a quarter of a mile from the *Applethwaite* and *Threlkeld* highway in a southerly direction to a gate close to the top of the hill called *Latrigg*.

From the said gate there runs a path nearly due east, leading to the highest point of the hill, distant about 237 yards from the gate, and continuing thence eastward to a nearly equally high point distant about eighty-eight yards further. The said road called *Calvert's Road*, and the said path, and the *Lower* or *Terrace Road* in the statement of claim referred to, have for very many years past been used by the public as of right as foot and horse ways, and the said roads are in fact respectively highways, the same having been dedicated to the public by the Plaintiff and her predecessors in title or some of them."

On the 17th of April, 1888, Mr. Justice *Kay* in Chambers made an order "that the Defendants do within fourteen days from the date of this order deliver to the Plaintiff full particulars of the nature of all acts of dedication relied on or claimed by them in paragraph 1 of their amended defence, and if the Defendants claim by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, and by whom made."

The Defendants appealed from this order, and the appeal was heard on the 2nd of May.

Kenelm E. Digby, for the appeal:—

The order of the 9th of February was made on the authority of *Harris* v. *Jenkins* (1). We therefore amended our defence by stating that we claimed the ways as highways by dedication. The Plaintiff then obtained an order for particulars of acts of dedication.

[COTTON, L.J.:—You are only ordered to give particulars if you rely on anything but permissive user.

LOPES, L.J.:—The order is wrong in using that expression. Permissive user does not raise any presumption of dedication.]

I contend that we have given all the information we are bound to give. User alone is sufficient evidence, and if user for a sufficient length of time is proved it lies on the Plaintiff to rebut it: *Reg.* v. *Petrie* (2). The Plaintiff is, in fact, asking us to disclose the particulars of our evidence.

(1) 22 Ch. D. 481.

(2) 4 E. & B. 737.

Byrne, Q.C., and *J. Dickinson*, *contrà* :—

We submit that the order is reasonable and proper. We want to know whether the Defendants rely on user alone, and if so, from what period to what period. We wish to know what case we have to meet at the trial. We might be able to prove that at the period relied on the user was had by license, and we ought to know to what time we have to direct our attention. The rule of pleading now is that a party should state the facts on which he relies, and not take his opponent by surprise. *Harris* v. *Jenkins* (1) assists us in principle, the reasoning in the judgment applies to the present case. It is clear on the authorities that one unequivocal act of dedication will make a way a highway. We do not want to have such a case sprung upon us at the trial. *Reg.* v. *Petrie* (2) is really in our favour; it shews the danger of going to trial on a vague case such as that set up by the Defendants. Unless particulars are furnished we shall have to prepare evidence for a long period, without knowing to what particular points to direct our attention. *The Rory* (3) shews the principle of ordering particulars. If the Defendants rely on nothing but user they should say so, and if they have any other case they ought to let us know what it is.

Digby, in reply :—

[COTTON, L.J. :—If you rely on any particular acts of dedication, ought you not to inform the Plaintiff of them ?]

It would be a hardship upon us if we were prevented from using any evidence at the trial because we are not able now to put it into our particulars.

[LOPES, L.J. :—If you discover any fresh case you can apply for leave to amend your particulars.]

COTTON, L.J. :—

The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken

(1) 22 Ch. D. 481. (2) 4 E. & B. 737.
(3) 7 P. D. 117.

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by surprise. In the present case the Defendants allege certain ways to be highways. A highway becomes such by being dedicated to the public, and proof of user by the public is in general sufficient evidence of dedication, unless it is shewn that during the period of user there was no person who could dedicate the land to the public. But dedication to the public may be proved in another way, by proof of acts and declarations of the owner. Here if the Defendants rely on anything but user, I think it is reasonable that the Plaintiff should be informed before the trial what is the nature of the acts and declarations on which they rely, and of the periods at which they took place, without stating the details or giving the particulars of their evidence. I think that the order ought not to stand as now, but ought to be in this form, "If the Defendants rely on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, let the Defendants within fourteen days set forth the nature and dates of the said acts or declarations and the names of the persons by whom the same were done or made."

The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial, but under the present system it is our duty to see that a party so states his case that his opponent will not be taken by surprise. The order therefore will stand with the alterations I have mentioned.

FRY, L.J.:—

I also think that the order of Mr. Justice *Kay* goes too far, and that the order we propose to make, and to which we think the Plaintiff entitled, is not likely to be of much use to her. The utmost to which the Plaintiff can be entitled, and I think she is entitled to it, is that if the Defendants rely not only on user, but on any specific acts or specific declarations of dedication, they should state what those acts or declarations are. Suppose the Defendants meant to rely on something done by one of the Plaintiff's predecessors in title—for instance setting up a stile on a path, which would be evidence of dedication—if such a case were not made known to the Plaintiff before the trial, there

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might be a failure of justice. If no particulars are delivered that will amount to a statement that the Defendants rely on nothing but user.

LOPES, L.J.:—

I should not myself have granted this order. It may be that I am too much influenced by the old common law practice, with which I am familiar, but it seems to me that the proposed order obliges the Defendants to set forth the evidence by which they mean to support their case.

Solicitors for Plaintiff: *Johnston, Harrison, & Powell*, agents for *J. Broatch & Gandy, Keswick.*

Solicitors for Defendants: *Nicol, Son, & Jones*, agents for *I. Lowthian, Keswick.*

H. C. J.

In re ALMADA AND TIRITO COMPANY.

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May 8, 9, 10.

Company—Issue of Shares at a Discount—Registered Contract—Companies Act, 1862, *s.* 8 [*Revised Ed. Statutes, vol. xiv., p.* 204]—*Companies Act*, 1867, *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

A company limited by shares under the Act of 1862 has no power to issue shares at a discount so as to render the shareholder liable for a smaller sum than that fixed for the value of the shares by the memorandum of association; and such issue will be invalid although the contract with the shareholder under which the shares were issued has been registered under sect. 25 of the *Companies Act*, 1867.

In re Plaskynaston Tube Company (1) and *In re Ince Hall Rolling Mills Company* (2) overruled.

THIS was a motion by *T. C. Allen*, a shareholder in the *Almada and Tirito Company, Limited*, to rectify the register of the company by striking his name off in respect of certain shares which had been issued to him under the following circumstances:—

The company was incorporated on the 1st of April, 1885, as a limited company under the *Companies Act*, 1862, with a capital of £210,000 in 210,000 shares of £1 each. The object of the company, as stated in the memorandum of association, was to acquire and work the property and undertaking of a previously

(1) 23 Ch. D. 542.

(2) 23 Ch. D. 545, n.

existing company called the *Almada and Tirito Consolidated Silver Mining Company.*

The articles of association adopted the regulations of Table A in the Schedule to the *Companies Act,* 1862, and provided that the company might reduce its capital in the manner and with any of the incidents prescribed or allowed by the *Companies Acts,* 1867 and 1877: and that the company might accept surrenders of shares, but might not expend any part of its assets in purchasing the company's own shares.

A resolution was passed at a special general meeting of the company on the 6th of June, 1887, and confirmed at a subsequent meeting of the 22nd of June, "That the capital of the company be increased from 210,000 shares of £1 each to 420,000 shares of £1 each, by the issue of 210,000 shares of £1 each credited with 18*s.* per share paid, with a deposit of 6*d.* per share."

Shares to the amount of 74,327 were applied for under this resolution, of which *Allen* applied for 200, and the applicants paid a deposit of 1*s.* on each share.

On the 4th of January, 1888, an agreement was executed between the company on the one part and *J. A. Morgan* on behalf of the subscribers for the new shares on the other part, witnessing that the company should forthwith have the agreement filed with the Registrar of Joint Stock Companies, and that the company should forthwith, after the filing of the agreement, allot and issue to the subscribers whose names were inserted in the schedule, in pursuance of their applications, the number of the shares set opposite their names in the schedule; and that the shares should be issued and held as shares of £1 each, with 18*s.* per share credited as paid up thereon, making, with the deposit of 1*s.* per share, the sum of 19*s.* paid up on each share.

This agreement was registered with the Registrar of Joint Stock Companies on the same day. No certificates of the new shares had been issued.

On the 24th of January, 1888, *Allen* having become acquainted with the decision of the Court in *In re Addlestone Linoleum Company* (1), moved before Mr. Justice *Chitty,* under the 35th section

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(1) 37 Ch. D. 191.

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of the *Companies Act*, that the register of members of the company might be rectified by striking out his name, and that the money paid on his shares might be returned to him; the ground of his application being that the issue of the shares at a discount was *ultrà vires* and void.

Mr. Justice *Chitty*, following his own decision in *In re Ince Hall Rolling Mills Company* (1), held that the issue of the shares was valid, and dismissed the application with costs. *Allen* appealed from this decision.

It was agreed between the parties that the result of the application should depend on the validity of the contract between the company and the shareholders, and that no question should be raised as to the form of the application.

Buckley, Q.C., and *Grosvenor Woods*, for the Appellant:—

The question in the present case was not absolutely decided in *In re Addlestone Linoleum Company* (2), because there was no contract registered in that case: but the principle involved was the same, and the observations of Lords Justices *Cotton* and *Lindley* (3) are strictly in point. It is true that Mr. Justice *Chitty*, in *In re Ince Hall Rolling Mills Company* and *In re Plaskynaston Tube Company* (4), held that a contract made by a company to issue shares at a discount is valid if registered, but those decisions are not binding on this Court, and are contrary to the principles laid down in *Trevor* v. *Whitworth* (5). The 8th section of the Act of 1862 enacts that the memorandum of association shall define the capital of the company and the amount of each share, and the object of this enactment would be entirely frustrated if by a mere resolution the company could alter the amount payable on any of the shares. And if the issue of the shares at a discount be *ultrà vires*, no registration of the contract to issue them can make it valid. The effect of the transaction was exactly the same as if the company had returned 18*s.* to each of the paid-up shareholders, which would certainly have been unlawful. The 25th section of the *Companies Act*, 1867, will not support the transaction. It was intended to apply to shares issued for a good consideration, though not in money. A payment of 2*s.* can never be a good consideration for the issue of a £1 share. When the Appellant took the shares he believed that the company had power to issue the shares at a discount, and if they had no such power, he is entitled to be relieved from his contract, and to have the money which he has paid returned.

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(1) 23 Ch. D. 545, n.
(2) 37 Ch. D. 191.
(3) 37 Ch. D. 204, 205.
(4) 23 Ch. D. 543.
(5) 12 App. Cas. 409.

Beale, Q.C., and *Chadwyck Healey*, for the company:—

We contend that *In re Ince Hall Rolling Mills Company* (1), and *In re Plaskynaston Tube Company* (2), were rightly decided. There is nothing in the Act of 1862 that makes this contract illegal. The Act deals with the nominal amount of capital, which the resolution did not interfere with. *Trevor* v. *Whitworth* (3) is distinguishable. The purchase by a company of its own shares has the effect of treating that as an asset which is not in fact such. That is not the case here. The transaction in the present case is valid within sect. 25 of the *Companies Act*, 1867. If the contract is registered, both shareholders and creditors are protected: *Waterhouse* v. *Jamieson* (4).

[COTTON, L.J.:—In that case it appeared from the memorandum of association that part of the capital had been paid up, and the allottees took the shares on that footing. In the present case nothing was said in the memorandum of association of the issue of these shares at a discount.]

The section covers every issue of shares where "the same," that is the terms on which the shares are issued, "shall have been otherwise determined by a contract duly made in writing and filed," etc. When this is done the Court does not inquire into the adequacy of the consideration for the issue of the shares. The company was in want of money and the immediate payment of 2*s.* was a good consideration for the release of the remaining 18*s.* If the contract had been to issue shares for the purchase of land or machinery which was worth much less than the nominal value of the shares the issue would have been perfectly good, and the Court could not have inquired into the adequacy of the

(1) 23 Ch. D. 545, n.
(2) 23 Ch. D. 543.
(3) 12 App. Cas. 409.
(4) Law Rep. 2 H. L., Sc. 29.

consideration unless there had been fraud: what difference can it make that the consideration is paid in cash instead of in land or goods? *Anderson's Case* (1); *Spargo's Case* (2); *Foakes* v. *Beer* (3); *Hippisley's case* (4); *In re West India and Pacific Steamship Company* (5); *Cumber* v. *Wane* (6). It has never been held illegal for companies to give a consideration for getting capital subscribed: and yet that is a deduction from the money paid on the shares. If the contract was void, there was a mistake of law on both sides, and the allottees have no right to a return of the money which they have paid.

Grosvenor Woods, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Chitty*, who really did not decide the question in this case, but merely in accordance with previous decisions of his made an order and sent the parties here.

The question is this:—The directors and shareholders of this company determined that there should be an increase of capital of £1 shares, but that they should be issued on this footing—that 18*s*. should be credited as paid, and that those who took the shares should only be liable to pay 2*s*. That was in accordance with resolutions which were passed by the company, and there was an offer of shares to Mr. *Allen* and others, who have accepted those shares. Is that right? Were the directors in a position to give the shares which they offered to their shareholders, and which some of the shareholders have accepted? In my opinion, they could not do so, because it is really saying that these shares, which are £1 shares, shall be taken on the footing of 2*s*. only being payable. That, it appears to me, is quite wrong. I decide it on the provisions of the Act of 1862, also taking into consideration the Act of 1867, on which the counsel for the company have relied. When we look at the Act of 1862, we find that that is an Act giving limited liability: and on what terms does it give limited liability? There is to be a memorandum of association, and there are to be articles of association. I will assume that here there is that which is equivalent to an article of association, enabling the company to do what has been proposed to be done. In my opinion that could not effectively be done, in order to protect anyone who held shares, and who had only paid in accordance with that article 2*s.* from being called upon at some future time, if this company is wound up, to pay 18*s.* more.

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(1) 7 Ch. D. 75.
(2) Law Rep. 8 Ch. 407.
(3) 9 App. Cas. 605.
(4) Law Rep. 9 Ch. 1.
(5) Ibid. 11, n.
(6) 1 Str. 426

Let us look at sect. 7 of the Act of 1862. "The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up." Of course, I need not consider the latter part of that, because it applies to companies of a different description. This was a company limited by shares, and we shall find presently the number of shares and the amount of the shares is to be defined by the memorandum of association, and the liability of the members depends in such a company on the question of what amount they had paid on the shares, having regard to the amount fixed by the memorandum. Then we come to the next section, sect. 8:— "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things": These are, shortly, the name of the proposed company; the part of the kingdom in which its registered office is; the objects for which it is established; a declaration that the liability of the members is limited; the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount. Now, going on those two sections only, this being a company to be limited by shares, the memorandum of association is to define how many shares there are to be and what is the fixed amount—that is the amount fixed by money—of each of those shares; and everyone is liable for so much of that amount

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fixed by the memorandum as it can be shewn he has not paid. Then is there any power to alter in that respect the memorandum of association? This is shewn in sect. 12, and there we find how, and how only, the memorandum can be varied: "Any company limited by shares may so far modify the conditions contained in the memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution in manner hereinafter mentioned, as to increase its capital by the issue of new shares of such amount as it thinks expedient, or to consolidate and divide its capital into shares of a larger amount than its existing shares, or to convert its paid-up shares into stock, but, save as aforesaid, and save as is hereinafter provided in the case of a change of name, no alteration shall be made by any company in the conditions contained in its memorandum of association;" that is to say, it cannot diminish the quantum of its shares, the money amount of its shares, and it cannot limit the liability to pay that amount so as to limit the liability of each shareholder and protect him against being called upon to pay what under the 7th section he is liable to pay in the event of the company being wound up. We must remember we are not dealing with a case where liability is imposed on persons who join in these companies, but where a limit is placed on the liability which they otherwise would have incurred if this Act had not been passed. I do not, of course, refer to the power given by a subsequent Act to reduce the amount of capital, which has not been followed here, but in my opinion, looking to those sections of the Act of 1862 only, it is perfectly clear that an agreement that you should pay 2*s.* on the shares you take, and not pay up the other 18*s.*, which would make up the amount in money fixed by the memorandum of association, would be entirely *ultrà vires.* It has been held that no company can return to its shareholders any of the money which they have paid, and in my opinion, without relying upon the fact that this is in substance returning the money as if it had been paid and then paid back again, there is no power to limit the liability of the shareholders to pay the amount unpaid on their shares. In my opinion it is tolerably clear here that the terms offered to the shareholders were, not that the 18*s.* should be treated as paid in a particular way, but that the 18*s.* should not be paid, just the same as if there had been a release given by the company for 18*s.* of the amount (Mr. *Beale* calls it the nominal amount, but I call it the amount) fixed in accordance with the Act of Parliament by the memorandum of association. So far therefore, I think it is clear that the company and the directors could not issue shares such as they proposed to issue in this case.

Then we come to the Act of 1867, the 25th section of which was relied upon. Does that cover it? I will not rely on the opinion expressed by Lord Justice *Lindley*, and by myself, in *In re Addlestone Linoleum Company* (1), for the point really was not for our decision there. I will deal with it as entirely free from and untouched by the expressions used in that case. Then what was this section intended to provide for? "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed." Was that intended to enable this to be done—that the sum fixed by the memorandum of association should not be paid at all in any way? We must see what difficulties had arisen in these companies at the time when this Act was passed. There had been shares taken and there had been agreements entered into —some perfectly fairly—that the amount of the shares should be treated as satisfied by goods to be supplied or goods which had been supplied to the company by the persons who took the shares. That was the prominent mischief intended to be dealt with by this section, and it was, therefore, really pointed only to the way in which payments for the shares should be made, not to the question whether the amount of the shares should be required to be paid at all. That is what was provided for, and although there is a little ambiguity in the language, in my opinion on the true construction of this section, what it was intended to deal with was the mode of payment, and not whether the whole amount should or should not be paid in some way or other. If it is paid otherwise than in what is the ordinary common measure of money, then it must be done under some

(1) 37 Ch. D. 204, 205.

agreement which is to be registered, that is an agreement that persons who shall supply goods shall be paid for those goods in shares, and that they shall be taken as payment for the shares, and that they shall not be paid for in money. It was asked in the argument, "How can you measure the value of the goods which are to be given and to be taken in payment of the shares?" If the contract does define the value, then, unless the contract is set aside as fraudulent, that will fix the shares as paid up, the contract being that a certain property or quantity of goods is to be taken in payment in full of the shares of the company. But suppose in such a case there was a contract that the person taking the shares should give to the company goods or an acre of land fixed by the contract and admitted by the parties as worth, not the amount of the shares, but only 10*s.*, then, although it does not arise for decision here, I in no way intimate any opinion that if such a company were wound up, a person who took shares on an admission that he was only giving half their value would not be held liable for the remainder, as a sum which, on his own admission and on the contract on which he took the shares, must be considered as only payment of part of the amount of the shares, leaving the other half unpaid, and therefore to be called up if there was a winding-up. That we have not to decide. But here it is so perfectly clear that 2*s.* never can be in any way treated as payment of 20*s.*, that the respondents are obliged to put their case in this way,—that the directors are to treat 18*s.* as paid, and only to call upon the person who takes the shares for 2*s.* That is equivalent to this: You take the shares, pay 2*s.*, and we will give you a release for the other 18*s.* However valuable it might be, and however important to the company it might be, to get the 2*s.*, yet that, in my opinion, can never make the amount unpaid on these shares less than 18*s.*

In my opinion the true effect of section 25 is what I have stated; and I may add this: If it had been intended by this section to do away with those provisions in the Act of 1862 to which I have referred, requiring the amount in money of the shares to be fixed by the memorandum—requiring the number of shares to be stated, and making every shareholder liable for everything which was unpaid on the shares, I think Parliament would have put the section in very different language, and would have provided for something which they have not provided for here, and stated that there might be a modification of those terms of the original Act in the way in which Mr. *Beale* has suggested that it can be done under this 25th section. In my opinion the 25th section in no way intended to provide for any portion of the money value of shares not being paid, but only provided that it might be paid by money value as well as by mere money. I must hold, therefore, that there was no power at all to issue shares on the footing of this memorandum. If these shareholders were put on the list and remained on the list, they would in the event of winding-up be liable to pay not only the unpaid shilling which is now unpaid, but the whole 18*s.* which still remains unpaid, that being the only limit of their liability in accordance with sect. 7 and the other sections of the Act of 1862. The result therefore must be that, as the company has put these gentlemen on the list of shareholders, and they did nothing which in any way was an assent to that being done, the contract being one which the company could not carry into effect, we must make an order that their names be removed from the register. There is no question raised as to the return of the 1*s.* they have paid. We might probably direct payment of such damages as we may think right; but there being no question raised on that point, the order will be to take them off the register of shareholders, and to return to each of them the 1*s.* per share which they have paid.

FRY, L.J.:—

I am of the same opinion, and I find myself quite unable to agree in the decision of the learned Judge. The question which we have to solve is, I think, simply and shortly answered by a reference to this inquiry—What is the nature of an agreement to take a share in a limited company? In my opinion it is an agreement to become liable to pay to the company the amount for which that share has been created. Further, it appears to me to be clear that the liability of the shareholders is limited only by the amount unpaid on the shares. Now, observe, it is the amount unpaid; it is not the amount remaining due. The result is that a release by the company will not diminish the liability—accord and satisfaction between the company and the shareholder will not diminish the liability; nothing will diminish or extinguish that liability but payment. The consequence is that we are driven to this second short inquiry, Is an agreement to take 2*s.* for 20*s.* a payment of 18*s.*? I say it is not. That appears to me to be the whole matter.

Then a supplemental question is raised in this way: it is said that however it stood under the Act of 1862, the result is altered by the 25th section of the Act of 1867. That section is in these words:—[His Lordship read the section.] What the exact words to which "the same" refer may be, it is a little difficult to ascertain; but I think the view suggested by Mr. *Phipson Beale* is the true one—that it means unless terms of payment otherwise have been determined.

Then we come to the inquiry: Is an agreement to take 2*s.* for 20*s.* a term or mode of paying 18*s.*? I have already said that in my judgment it is not a payment of 18*s.* It, therefore, cannot be a term or mode of payment. Consequently the registration of this agreement, which is an agreement in effect to release the 18*s.*, is entirely inoperative under the 25th section of the Act of 1867. When we have determined this question the rest of the matter is arranged between the parties. Mr. *Beale* has, I think very properly, not thought fit to argue whether such a contract as this, entered into under a common mistake of law, is or is not capable of being rescinded, or whether the 1*s.* can be claimed as damages. It has been agreed between the parties that the result of this application is to depend upon our decision as to the real nature of the contract.

Lopes, L.J.:—

I entirely agree with the judgments which have been delivered, and I will in a very few words express my views. Every limited company is required to state in its memorandum the amount of capital with which it proposes to be registered divided into shares of a certain fixed amount. Now, to my mind, this cannot be intended to be an idle or objectless requirement; but the amount of the share is to be the real sum to be paid, either in cash or, subject to the restrictions of sect. 25, in kind, which the company contracts to accept as of that cash value. In sect. 25 there can be found no provision of any sort or kind except the shares being paid up in full. I can see no practical distinction between issuing shares at a discount and returning to the member a portion of the capital to which the creditors have a right to look as that out of which they are to be paid. Issuing the shares at a discount, to my mind, would be rendering one of the statutory requirements of the Act an empty form. The case of *Trevor* v. *Whitworth* (1) has been referred to, and it appears to me that the reasoning and the decision in that case is applicable here. Another case referred to was the case of *In re Addlestone Linoleum Company* (2), where no doubt the question of whether the shares might be issued at a discount was not directly raised, but there are expressions of opinion by Lord Justice *Cotton* and Lord Justice *Lindley*, with which I concur, entirely in harmony with the decision at which the Court has now arrived. I am of opinion, therefore, that there is no power to issue these shares at a discount, and that the names of the shareholders in question must be removed from the register.

COTTON, L.J.:—

I did not in my judgment refer to the case of *Waterhouse* v. *Jamieson* (3) in the House of Lords, as I thought I had sufficiently disposed of it in the course of the argument. I do not think it has any application to this case.

Solicitors: *Stacpoole, Batters, & Stacpoole*; *Wilkins, Blyth, & Dutton.*

(1) 12 App. Cas. 409.
(2) 37 Ch. D. 191.
(3) Law Rep. 2 H. L., Sc. 29.

M. W.

SHARP *v.* McHENRY.

[1885 S. 188.]

SHARP *v.* BROWN.

[1886 S. 3303.]

KAY, J.

1887

Aug. 4, 6, 8, 9, 10.

Bankruptcy—Petition—Liquidation—Composition—"Act of Bankruptcy"—Adjudication—Relation back—Mortgage—Fraudulent Preference—Bill of Sale—Registration—"True Copy"—Blanks—"Occupation" of Grantor—"Consideration"—Contemporaneous Instrument—Concealment—Bankruptcy Act, 1869, *ss.* 6, 10, 11, 92, 94, 95, 125, 126—*Bankruptcy Rules,* 1870—*Bills of Sale Act,* 1878, *ss.* 8, 10, *sub-s.* 2 [*Revised Ed. Statutes, vol. xviii., p.* 654]—*Bills of Sale Act* (1878) *Amendment Act,* 1882, *ss.* 8, 9.

Where a debtor, who has filed a petition for liquidation by arrangement or composition under sects. 125 and 126 of the *Bankruptcy Act,* 1869, containing a statement of his inability to pay his debts, subsequently makes a composition with his creditors under sect. 126, but is eventually adjudged bankrupt under that section, the adjudication does not relate back to the act of bankruptcy committed in the filing of the petition, unless such act of bankruptcy has occurred within six months before the presentation of the petition for "adjudication" (sects. 6, 11), or, if it is the first of several acts of bankruptcy as defined in sect. 6, unless it has been committed within twelve months before the order of adjudication (sect. 11), such act of bankruptcy being, after the expiration of those periods, no longer available for adjudication. Consequently, after the expiration of those periods, a disposition of his property by the compounding debtor by way of security to a particular creditor is not rendered void on the ground of any relation back of the title of the trustee on a subsequent adjudication under sect. 126 (1).

Thus, where a debtor—who in 1879 had executed a mortgage and registered bill of sale to a creditor as securities for an existing debt and for a further sum advanced to enable him, the debtor, to prosecute an action which, if successful, would benefit his creditors as well as himself—filed, eight days afterwards, a liquidation petition, and then made a composition with his creditors under sect. 126, but, in consequence of his non-payment of the composition, was in 1886 adjudicated bankrupt under that section, it was held that the adjudication did not relate back to the filing of the petition so as to give the trustee under the adjudication a title to claim that the securities should be set aside on the ground of fraudulent preference under sect. 92:—

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(1) See *In re McHenry, Ex parte McDermott,* W. N. 1888, p. 101.

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Quære, whether, if there had been a relation back, the securities would not have been void as constituting a fraudulent preference.

The doctrine of relation back in the case of an adjudication under sect. 126, considered and explained.

A "true copy" of a bill of sale within sect. 10, sub-sect. 2, of the *Bills of Sale Act*, 1878, does not necessarily mean an exact copy: it is a sufficient compliance with the Act if the copy is true in all essential particulars, so that no one can be misled as to the effect of the bill of sale.

Thus, where, in a "copy" of a bill of sale, filed with the registrar as required by that sub-section, the amount of the debt was duly stated in the operative part, but was, by a clerical omission, referred to in the power of sale, and also in the covenant for quiet enjoyment until default, as "the said sum of ," though the blanks did not occur in the original, it was held that the copy was a "true copy" within the meaning of the sub-section.

The object of sect. 10, sub-sect. 2, of the *Bills of Sale Act*, 1878, in requiring that a bill of sale shall describe the "occupation" of the grantor, as well as his residence, is to identify him; and if the description gives a true indication of his profession, business or calling in life by which he can be identified, although he may not be actively carrying on such profession, business, or calling at the date of the bill of sale, that is a sufficient compliance with the sub-section.

Thus, where a bill of sale described the grantor as a "contractor and financial agent"—a proper description of his calling in life, though, in consequence of his time and attention having been taken up by litigation with a foreign railway company to whom he had acted for some years as financial agent in this country, he had ceased, for five years prior to the date of the bill of sale, to actively carry on business—it was held that his "occupation" was sufficiently described within sect. 10, sub-sect. 2.

Under sect. 8 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882, a bill of sale is void unless it "truly sets forth the consideration for which it was given"; that is to say, it must shew, on the face of it, the true agreement between the parties, and must not be dependent for its real effect upon some other instrument.

Thus, where *M.* agreed in writing to execute in favour of *S.* certain instruments, including a bill of sale, as securities for a debt, the agreement providing, amongst other things, for payment of compound interest, and *M.* accordingly executed a bill of sale, which did not explain the real nature or extent of the agreement, and contained only such part of it as could properly be embodied in a bill of sale, it was held that the bill of sale was void.

Simpson v. *Charing Cross Bank* (1) followed.

IN the year 1871 or 1872 the Plaintiff, *Henry Parkinson Sharp*, began to engage in pecuniary transactions with the Defendant, *James McHenry*, who was then carrying on business as a contractor for railways and other public undertakings and a financial agent for public companies.

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(1) 34 W. R. 568.

In April, 1872, *McHenry* commenced acting as financial agent in this country for the *Erie Railway Company* of *America*, and he continued so to act until the 23rd of October, 1874, when the company repudiated the agency.

In April, 1876, the *Erie Railway Company* commenced an action, *Jewett* v. *McHenry*, against *McHenry* for the recovery of moneys which the company alleged to be due from him in respect of the agency transactions.

In 1878 *Sharp* lent *McHenry* some shares in the *Erie Railway Company*, and *McHenry* became largely indebted to *Sharp* in respect of that loan.

The action of *Jewett* v. *McHenry* was referred to an official referee, who, in April, 1879, made an award finding a sum of upwards of £281,000 to be due from *McHenry* to the company.

In the meantime litigation had commenced between *Sharp* and *McHenry*, *Sharp* claiming from *McHenry* repayment of the moneys *McHenry* owed him in connection with the loan of the *Erie* shares. On the 19th of May, 1879, the litigation was referred to a Mr. *Batten*, a friend of both parties, as arbitrator, and ultimately, on the 5th of August, at a meeting at the arbitrator's office, both parties agreed upon a sum of £19,123 13*s.* 3*d.* as the amount due from *McHenry* to *Sharp*, and told the arbitrator that he might make an award for that sum. Accordingly, on the following day, the 6th of August, 1879, the arbitrator made his formal award in writing for that sum.

On the next day, the 7th of August, two deeds were executed by *McHenry* to *Sharp*. The first was made between *McHenry* of the first part and *Sharp* of the second part; and after reciting that the sum of £19,123 13*s.* 3*d.*, with interest amounting to £516 6*s.* 6*d.* (making together £19,639 19*s.* 9*d.*), was due from *McHenry* to *Sharp* under the award, and that *Sharp* had agreed to advance him the further sum of £5000 upon having the same and the said sum of £19,639 19*s.* 9*d.* secured as therein mentioned, it was witnessed that in consideration of the sum of £5000 then paid by *Sharp* to *McHenry*, he, *McHenry*, thereby charged his freehold and leasehold premises at *Kensington* therein described (but subject to prior incumbrances therein mentioned) with repayment to *Sharp* of the sum of £24,639 19*s.* 9*d.* (being the aggregate of the £19,639 19*s.* 9*d.* and £5000), and interest thereon at £4 10*s.* per cent. per annum; and *McHenry* thereby covenanted to execute to *Sharp*, when required, a legal mortgage containing a power of sale and all usual covenants and provisions.

The second deed was a bill of sale made between the same parties, *McHenry* being described as "of *Oak Lodge, Addison Road*, in the county of *Middlesex*, contractor and financial agent." After reciting, as in the other deed, the debt of £19,639 19*s.* 9*d.* under the award, and the agreement for the further advance of £5000, it was witnessed that in consideration of the premises and of the sum of £5000 paid to *McHenry* the mortgagor by *Sharp* the mortgagee, he, the mortgagor, thereby assigned to the mortgagee, his executors, administrators, and assigns all the furniture, goods, and chattels then in, about and belonging to *Oak Lodge* aforesaid, then in the occupation of the mortgagor, to hold unto the mortgagee his executors, administrators, and assigns, as his and their own property and effects. Then followed a proviso for the cesser and determination of the security on payment by the mortgagor to the mortgagee, on demand, of the total mortgage debt of £24,639 19*s.* 9*d.* with interest thereon at £4 10*s.* per cent. per annum. Then there was a covenant by the mortgagor for payment, on demand, of the £24,639 19*s.* 9*d.*, and also "so long as the said sum of £24,639 19*s.* 9*d.*, or any part thereof, shall remain owing on the security of these presents, to pay to the mortgagee, his executors, administrators, or assigns, interest upon the said sum of £24,639 19*s.* 9*d.*, or so much thereof as may remain unpaid, at the rate of £4 10*s.* per cent. per annum, by four quarterly payments on the usual quarter days, without any deductions whatever." Then followed a power, in case of default in payment of the mortgage debt and interest, for the mortgagee, his executors, administrators, and assigns, to take possession of the furniture, goods, and chattels thereby assigned, and also to sell the same, and out of the proceeds in the first place to reimburse himself and themselves all costs, charges, and expenses he or they might incur in and about making any such sale, "and also in and about the receipt and recovery of the said sum of *£24,639 19s. 9d.*, and interest respectively; and in the next place to retain and to reimburse himself and themselves, the mortgagee, his executors, administrators, or assigns, the said sum of *£24,639 19s. 9d.*, and the interest thereon. And lastly it was agreed and declared that, "until default shall happen to be made in payment of the said principal sum of *£24,639 19s. 9d.* and interest," contrary to the proviso thereinbefore contained, the mortgagor should have the quiet enjoyment of the furniture, goods, and chattels thereinbefore assigned.

The bill of sale was duly registered under sect. 8 of the *Bills of Sale Act*, 1878, but in the "copy" of it filed with the registrar under sect. 10, sub-sect. 2, the amount of the mortgage debt in the three places above indicated in italics was left in blank, though not so in the original.

The affidavit also filed with the registrar under sect. 10, sub-sect. 2, described *McHenry* in the same terms as in the bill of sale.

Previously to the date of the above deeds, namely on the 8th of July, 1879, the late Master of the Rolls, Sir *George Jessel*, had made an order in *Jewett* v. *McHenry*, directing *McHenry* to pay some £260,000 to the *Erie Railway Company*, within one month, which would expire on the 8th of August; and the further advance of £5000 mentioned in the deeds was a sum borrowed from *Sharp* by *McHenry*, to enable him to prosecute an appeal which he was then contemplating from that order.

Eight days after the execution of the two deeds, namely, on the 15th of August, 1879, *McHenry* filed a petition for liquidation by arrangement or composition under sects. 125, 126 of the *Bankruptcy Act*, 1869, in form 106 in the Schedule to the Bankruptcy Rules, 1870, and a receiver of his property was appointed. A meeting of his creditors was subsequently held, but was repeatedly adjourned.

In January, 1881, the Court of Appeal substantially, but with some variations, affirmed the decision of the Master of the Rolls in *Jewett* v. *McHenry*.

On the 22nd of October, 1882, after many adjournments, a general meeting of *McHenry's* creditors was held, at which they passed a resolution agreeing to accept a composition of 20*s.* in the pound, payable by instalments, and *McHenry* was directed to execute a conveyance of his freehold and leasehold property at *Kensington* to the receiver, subject to the existing charges thereon. That resolution was confirmed at another general meeting of the creditors on the 1st of November, 1883, and was duly confirmed by the Court of Bankruptcy on the 13th of November following. The resolutions were duly registered, and a conveyance of *McHenry's* said freehold and leasehold property to the receiver was duly executed.

On the 26th of November, 1884, *Sharp* gave *McHenry* notice in writing demanding payment of the mortgage debt, and, in default of payment, possession of the furniture, goods, and chattels which were in *Oak Lodge* at the date of the bill of sale; but *McHenry* neither paid the money nor gave up possession.

On the 13th of January, 1885, *Sharp* commenced the first of the present actions, *Sharp* v. *McHenry,* against *McHenry* and the receiver, claiming to have an account taken of what was due to him, *Sharp,* under the two mortgage securities; also to have those securities enforced, and other relief. About the same date *Sharp* commenced an action against *McHenry* in the Queen's Bench Division also to enforce the securities.

On the 27th of April, 1885, *Sharp* delivered his statement of claim in the Chancery action.

On the 22nd of June, 1885, *Sharp* and *McHenry* entered into a memorandum of agreement of terms for staying the Chancery and Queen's Bench actions, the memorandum being intituled in the two actions. By this memorandum *McHenry* agreed to deliver to *Sharp* an inventory of all the furniture and goods then in *Oak Lodge;* also that the interest then due on the mortgage securities of the 7th of August, 1879, should be capitalised at £3848; that he, *McHenry,* would on or before the 4th of July, 1885, procure a transfer to *Sharp* and another of certain shares or certificates in an American company, and of all his interest therein, and execute a valid deed of covenant in favour of *Sharp* to pay the £3848 and interest thereon at 5 per cent. per annum, and also interest on the original mortgage debt of £24,639 19*s.* 3*d.* at the same rate, such interest respectively to be calculated half yearly on the 22nd of December and the 22nd of June in each year; that if such interest should not be paid within twenty-one days after those dates, it should be capitalised at compound interest, bearing interest at 5 per cent. per annum; that *McHenry* would, on or before the 30th of July, 1885, procure to be executed by all proper parties, in favour of *Sharp*, a valid deed of charge on the said American shares or certificates; that *McHenry* would, on or before the 4th of July, 1885, duly execute to *Sharp* a bill of sale on his furniture and goods comprised in the said inventory (subject to the existing charge created by the bill of sale of the 7th of August, 1879), to secure all moneys charged upon the said shares and certificates, or due or to accrue due under the deed of covenant as aforesaid; and that, for the purposes of this memorandum, the said 4th of July, 1885, should be considered as of the essence of the memorandum. It was also agreed that *Sharp* should stay all further proceedings in the actions until *McHenry* made default in carrying out the memorandum, or in making payment of money which might accrue under the said mortgage securities or charge to be given under it; but right was reserved to *Sharp* to proceed with the actions in case of *McHenry's* default in payment of all moneys to be secured by such deed, covenant, and bill of sale as aforesaid.

In pursuance of that agreement *McHenry* gave *Sharp* a further bill of sale, dated the 3rd of July, 1885, on his furniture and chattels in *Oak Lodge*, and also executed to him a deed of covenant dated the 6th of July, 1885.

On the 18th of March, 1886, *McHenry* never having paid any of the instalments under the composition agreed to by his creditors, proceedings were taken by way of motion to obtain an adjudication in bankruptcy against *McHenry* under sect. 126 of the *Bankruptcy Act*, 1869, and on the 25th of March following an order of adjudication in bankruptcy was made against him under that section. He appealed from that order, and on the 9th of April, 1886, the Court of Appeal dismissed the appeal. On the 26th of May, 1886, Messrs. *Brown & Whiffin* were appointed trustees in the bankruptcy, and on the 19th of June following the receiver conveyed all his interest in the bankrupt's freehold and leasehold property to those trustees. *Sharp* then proceeded with the Chancery action of *Sharp* v. *McHenry*, by obtaining an order dated the 1st of July, 1886, adding the bankruptcy trustees, *Brown & Whiffin*, as Defendants, and by delivering, on the 5th of July, an amended statement of claim with the trustees added as Defendants, and containing allegations of the bankruptcy proceedings.

On the 28th of July *Sharp* delivered a re-amended statement of claim, alleging the conveyance of the bankrupt's freehold and leasehold property by the Defendant, the receiver, to the Defendants, the trustees, *Brown & Whiffin*, and that the receiver (against whom all proceedings had in the meantime been stayed) had no interest therein.

The Defendants *Brown & Whiffin* delivered their defence on the 26th of October, 1886, in which they alleged that the bill of sale of the 7th of August, 1879, had not been duly registered; that their title as trustees under *McHenry's* adjudication related back to the commencement of the bankrupty; that both the deeds of the 7th of August, 1879, were fraudulent and void as against them; and that the chattels comprised in the bill of sale of that date were, at the commencement of the bankruptcy, in the possession, order, or disposition of *McHenry*, being a trader, as reputed owner, with the consent of the true owner thereof, and were also, at the time of the filing of his petition in bankruptcy, in his apparent possession.

Previously, on the 23rd of July, 1886, *Sharp* had issued his writ in the second Chancery action, *Sharp* v. *Brown*, against *Brown & Whiffin* to enforce the other bill of sale, namely, that of the 3rd of July, 1885, which was, as above stated, executed by *McHenry* in pursuance of the memorandum of agreement of the 22nd of June, 1885. That bill of sale—which was duly registered—was made between *McHenry* of the one part and *Sharp* of the other part. It recited that there was then due from *McHenry* to *Sharp* the sum of £24,639 19*s.* 9*d.* on the security of the previous bill of sale of the 7th of August, 1879, and also the further sum of £3848 14*s.* 9*d.* for arrears of interest up to the 22nd of June, 1885, and that *McHenry*, in consideration of *Sharp* forbearing to enforce immediate payment of those two sums, had agreed to execute to *Sharp* such security as thereinafter contained for payment of the £3848 14*s.* 9*d.* and interest, and of interest thenceforth on the £24,639 19*s.* 9*d.* at 5 per cent. per annum. Then it was witnessed that, in consideration of those two sums then due from *McHenry* to *Sharp* and of *Sharp's* forbearance to enforce immediate payment thereof, *McHenry* assigned to *Sharp* all and singular the chattels and things described in the schedule thereto (subject to the previous bill of sale) by way of security for the payment of the said £3848 14*s.* 9*d.* and interest thereon at 5 per cent. per annum and of interest at the same rate on the said £24,639 19*s.* 9*d.* And *McHenry* covenanted for payment, on the 30th of June, 1886, of £3848 14*s.* 9*d.* together with interest thereon, and for payment of interest on the £24,639 19*s.* 9*d.* half-yearly.

The chattels and things described in the schedule to this bill of sale included the whole or the greater part of the furniture and effects at *Oak Lodge* comprised in the previous bill of sale.

On the 26th of October, 1886, the Defendants *Brown & Whiffin* delivered their statement of defence in the second Chancery action, alleging that the bill of sale of the 3rd of July, 1885, was not in the form required by the *Bills of Sale Acts*, and did not set forth the true consideration and was void: also that their title as trustees under the adjudication related back to such bill of sale, and also to the commencement of the bankruptcy, a date anterior to such bill of sale, and overreached *Sharp's* title (if any) thereunder: that such bill of sale was fraudulent and void as against the Defendants: and that the chattels comprised in it were, at the commencement of the bankruptcy, in the possession, order, or disposition of *McHenry*, being a trader, as reputed owner, with the consent of the true owner thereof.

Issue having been joined in both actions, they now came on for trial together.

The main questions for argument were: (1.) Whether, under the *Bankruptcy Act*, 1869, the title of the trustees under the adjudication of the 25th of March, 1886, related back to the "act of bankruptcy" committed in the filing of the petition for liquidation on the 15th of August, 1879, so as to make the securities executed on the 7th of August, 1879, that is only eight days previously, void as being a fraudulent preference: (2.) Whether the bill of sale of the 7th of August, 1879, was also void under sect. 10, sub-sect. 2 of the *Bills of Sale Act*, 1878, on the grounds (*a*) that the "copy" filed with the Registrar was not a "true copy," containing, as it did, blanks not occurring in the original, and (*b*) that it did not contain a proper description of *McHenry's* "occupation," it being said that he was not carrying on, at the date of the bill of sale, the business of a "contractor and financial agent"; and (3.) Whether the bill of sale of the 3rd of July, 1885, was void under the *Bills of Sale* (1878) *Amendment Act*, 1882, sect. 8, on the ground that it did not "truly set forth the consideration for which it was given," inasmuch as it comprised only a part of the arrangement entered into by the memorandum of agreement of the 22nd of June, 1885.

As to the blanks in the filed copy of the first bill of sale, they appeared, from the evidence, to have occurred accidentally, the solicitor employed in the matter having filled in the figures in the engrossment, but having forgotten to do so in the copy.

As to *McHenry's* "occupation" at the date of the first bill of sale, he deposed, in his examination and cross-examination, that his business originally was that of a railway contractor and financial agent; that he had acted as such for several companies besides the *Erie Company*, but that during his litigation with that company which followed the termination by them, in 1874, of their business connection with him, his time and energies were so taken up by that litigation that he had been unable to carry on his business, though it did not appear that he ever formally renounced it; in fact, he said that, in 1881, he acted as "financial agent" for another American company, and received £3000 for his services.

Sir *Horace Davey*, Q.C., *Levett*, and *Gorell Barnes*, for the Plaintiff in both actions:—

First, it is said that *McHenry's* bankruptcy adjudication of the 25th of March, 1886, relates back to the filing of the petition on the 15th of August, 1879, and that, therefore, both the deeds of the 7th of August, 1879, are void on the ground of fraudulent preference, as having been executed on the eve of bankruptcy. The adjudication was made under sect. 126 of the *Bankruptcy Act*,

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1869, which enables the Court to adjudge a debtor a bankrupt if it appears that previous composition proceedings under that section cannot be proceeded with. If it is the fact that an adjudication under that section relates back to the presentation of the petition, then every dealing by the debtor after the commencement of the composition proceedings would be invalid. The result, then, of the argument on the other side, if sound, would be that if a man makes a composition with his creditors he cannot afterwards make a title to any part of his property, because he would still be liable to be made a bankrupt, and his bankruptcy would relate back to the composition, or even to the presentation of the petition. But we submit the true doctrine is that, notwithstanding a composition, a debtor may dispose of his property as he pleases, and that no person taking under him is bound to inquire whether the composition is payable. The power given to the Court by sect. 126 to adjudge a compounding debtor a bankrupt is a discretionary power, and is independent of the commission by him of an act of bankruptcy: *Ex parte Charlton* (1); and Lord Justice *James* there (2) expresses his opinion that there is not, when the Court exercises that power, any relation back of the trustee's title, and that the bankruptcy begins with the finding of the Court that the composition cannot proceed without injustice or undue delay. Then it is also laid down in *In re Kearley and Clayton's Contract* (3) that a debtor who has made a composition with his creditors has complete dominion over his property until, upon action taken by his creditors under sect. 126, the composition has been set aside and he has been adjudged a bankrupt. Even if the adjudication in the present case did relate back, it would be impossible to make out the securities of the 7th of August, 1879, to be a fraudulent preference, inasmuch as hard cash was advanced to enable *McHenry* to prosecute an appeal, which if successful, would be beneficial to his creditors as well as to himself. The *onus* of proving that the securities were fraudulent and void would lie on the Defendants, and that *onus* it would, for the reason stated, be impossible for them to discharge.

(1) 6 Ch. D. 45.

(2) 6 Ch. D. 52.

(3) 7 Ch. D. 615.

Then it is said that the bill of sale of the 7th of August, 1879, is void, because the "copy" of it filed with the registrar under sect. 10, sub-sect. 2, of the *Bills of Sale Act*, 1878, is not a "true copy," the amount of the mortgage debt stated in the original being left blank in three places in the copy. But these blanks are mere clerical errors, and quite immaterial, since the amount of the debt fully appears in the operative part. A "true copy" need not necessarily be an exact copy, so long as the errors are merely clerical and such that no one can be misled: *Ex parte Kahen* (1). It is also said that this bill of sale is void because it does not correctly describe *McHenry's* "occupation" within the meaning of the same section; but we submit that *McHenry's* evidence shews that his calling in life was that of a "contractor and financial agent," although he might not have been actually carrying on business at the date of the deed. All that the Act requires is that the giver of the bill of sale shall be identified.

With regard to the second bill of sale, that dated the 3rd of July, 1885, we submit that that is a good deed also, and that the defence on the ground that it was "fraudulent and void" fails.

Winslow, Q.C., *Marten*, Q.C., and *Yate Lee*, for the Defendants:—

The securities of the 7th of August, 1879, constituted a fraudulent preference whereby *McHenry* sought to prefer the Plaintiff over his other creditors, and were therefore void under sect. 92 of the *Bankruptcy Act*, 1869. Under sect. 11 of the same Act the adjudication of the 25th of March, 1886, related back to the original act of bankruptcy, namely, the declaration by *McHenry* of his inability to pay his debts contained in the petition presented on the 15th of August, 1879: *Bankruptcy Act*, 1869, s. 6, sub-s. 4; Bankruptcy Rules, 1870, rr. 16, 252, Sched. Form 106; *Ex parte Credit Company* (2). In a liquidation by arrangement under sect. 125 of the same Act the title of the trustee relates back to the filing of the petition, which is an act of bankruptcy: *Ex parte Duignan* (3). If a bankruptcy supervened,

(1) 21 Ch. D. 871.
(2) 24 Ch. D. 353.
(3) Law Rep. 11 Eq. 604; 6 Ch. 605.

taking the property of the debtor out of the hands of the trustee under the liquidation, and vesting it in the trustee in bankruptcy, it would be absurd to contend that the title of the trustee in bankruptcy did not have a like relation back in the case of a composition.

But *McHenry's* bankruptcy commenced even earlier than the presentation of his petition, namely, when he committed an "act of bankruptcy" by making a fraudulent transfer of his property: *Ex parte Attwater* (1). By virtue of sects. 10 and 11 an adjudication of bankruptcy is conclusive, so long as it stands, against a third person, such as the holder of a bill of sale executed by the bankrupt, that the act of bankruptcy has been committed and that the title of the trustee relates back to the act of bankruptcy: *Ex parte Learoyd* (2). The position of a compounding debtor is this: no composition can be agreed upon until after the filing of a petition: so long as the composition is paid, and the composition proceedings are going on in a proper manner, the act of bankruptcy committed by the filing of the petition is not available for adjudication, and therefore the debtor is master of his property, and *bonâ fide* dealings with him are protected by sects. 94 and 95; but the moment an adjudication is made under sect. 126—which, since *Ex parte Charlton* (3) is usually done on motion, not on petition—it relates back to the act of bankruptcy. This view is supported by *Ex parte Charlton*; *In re Kearley and Clayton's Contract* (4); and *Ex parte Hoare* (5). What constitutes "fraudulent preference" is explained in *Ex parte Griffith* (6); *Ex parte Hill* (7); *Tomkins* v. *Saffery* (8); and *Butcher* v. *Stead* (9).

Again, the bill of sale of the 7th of August, 1879, is void, because the description of *McHenry* as a "contractor and financial agent" was incorrect, he having ceased for five years previously to carry on the business of a contractor and financial agent. The description of the occupation of the grantor of a bill of sale, in order to satisfy the requirements of the *Bills of Sale Acts*, 1854 and 1878 (17 & 18 Vict. c. 36, s. 1; 41 & 42 Vict. c. 31, s. 10, sub-s. 2), must be of his present daily occupation at the time of the making of the bill of sale: *Cooper* v. *Davis* (1); *Allen* v. *Thompson* (2); *Button* v. *O'Neill* (3); *Ex parte Schomberg* (4); *Ex parte M'George* (5). The *onus* is on the Plaintiff to prove that *McHenry* was a contractor and financial agent at the time of the making of the bill of sale.

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(1) 5 Ch. D. 27, 30.
(2) 10 Ch. D. 3.
(3) 6 Ch. D. 45.
(4) 7 Ch. D. 615.
(5) Law Rep. 16 Eq. 625.
(6) 23 Ch. D. 69.
(7) Ibid. 695.
(8) 3 App. Cas. 213.
(9) Law Rep. 7 H. L. 839.

Moreover, the copy of the bill of sale which was registered, containing, as it did, blanks in the power of sale was not a "true copy" within the meaning of sect. 10, sub-sect. 2 of the *Bills of Sale Act*, 1878.

The second bill of sale is also void as a fraudulent preference. It is also void under the *Bills of Sale Act*, 1878, s. 8, and the *Bills of Sale Act* (1878) *Amendment Act*, 1882, ss. 8 and 9, because it does not truly set forth the consideration, the deed of covenant containing provisions for the payment of interest differing from those in the bill of sale; because it does not state the time for payment of the money required; because it is not in accordance with the form given in the schedule to the latter Act; and because it is not an independent deed, but dependent upon another instrument, namely, the memorandum of agreement, which is not in accordance with the Acts, containing, as it does, provisions, amongst others, for securing compound interest: *Ex parte Challinor* (6); *Simpson* v. *Charing Cross Bank* (7); *Ex parte Odell* (8); *Davis* v. *Burton* (9); *Ex parte Stanford* (10).

Sir *H. Davey*, in reply:—

The securities of the 7th of August, 1879, did not constitute a fraudulent preference, as the further advance of £5000 was required by *McHenry* for a legitimate purpose which might be beneficial to his general creditors, and his dominant motive was the prosecution of the appeal in his action with the *Erie Railway*

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(1) 31 W. R. 721; 32 W. R. 329.
(2) 1 H. & N. 15.
(3) 4 C. P. D. 354.
(4) Law Rep. 10 Ch. 172.
(5) 20 Ch. D. 697.
(6) 16 Ch. D. 260.
(7) 34 W. R. 568.
(8) 10 Ch. D. 76.
(9) 11 Q. B. D. 537.
(10) 17 Q. B. D. 259.

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Company: Ex parte Stubbins (1); *Ex parte Taylor* (2); *Ex parte Griffith* (3); *Ex parte Hill* (4). The first clause of sect. 11 of the *Bankruptcy Act*, 1869, has no application to this case, because the order adjudging *McHenry* to be bankrupt was not made upon the original act of bankruptcy, but under the discretionary and extraordinary jurisdiction given by sect. 126, which, in effect, creates a statutory act of bankruptcy: *Ex parte Charlton* (5). In the argument against me the essential distinction which exists between liquidation and composition proceedings has been overlooked. It is of the essence of liquidation proceedings that the debtor is not left master of his property, whereas it is otherwise under a composition: *In re Kearley and Clayton's Contract* (6). The transition from liquidation to bankruptcy is therefore wholly different from that from composition to bankruptcy.

The description of *McHenry* in the first bill of sale was sufficient and correct. The object of requiring the occupation of the grantor to be stated is to identify him. No description of the occupation of *McHenry* could have been given which would better tend to identify him than that of contractor and financial agent. That was, and continued to be, the vocation of his life: *Sutton* v. *Bath* (7); *Tuton* v. *Sanoner* (8); *Ex parte National Mercantile Bank* (9); *Blount* v. *Harris* (10).

The blanks in the registered copy of the bill of sale could not mislead any one. The copy was therefore a "true copy": *Ex parte Kahen* (11), where Vice-Chancellor *Bacon* said (12): "A 'true copy' does not necessarily mean an exact copy."

The second bill of sale is valid. It constituted a complete contract, independently of the deed of covenant, which was a mere collateral contract not affecting the goods comprised in the bill of sale; and there is nothing in the Acts of Parliament requiring that such a contract should be set forth in the bill of sale: *Simpson* v. *Charing Cross Bank* (1); *Ex parte Odell* (2); *Ex parte National Mercantile Bank* (3).

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(1) 17 Ch. D. 58.
(2) 18 Q. B. D. 295.
(3) 23 Ch. D. 69.
(4) Ibid. 695.
(5) 6 Ch. D. 45.
(6) 7 Ch. D. 615.
(7) 3 H. & N. 382.
(8) Ibid. 280.
(9) 15 Ch. D. 42.
(10) 4 Q. B. D. 603.
(11) 21 Ch. D. 871.
(12) Ibid. 875.

KAY, J. (after stating the facts, continued):—

The first point with which I will deal, and which has been argued at great length before me, is this. It is said that the adjudication in bankruptcy, which was made on the 25th of March, 1886, relates back to the petition for liquidation by arrangement or composition which was presented on the 15th of August, 1879, that is to say, more than six years previously; and that, so relating back, the transaction which took place on the 7th of August, 1879, by way of mortgage and bill of sale, was a fraudulent preference, because it was within the time fixed by the 92nd section of the Act of 1869 before the commencement of the bankruptcy.

The first question upon which I will express an opinion is, whether or not there was such a relation back. The scheme of the Act of 1869, as I understand it, is this. The 6th section provides that certain acts committed by the debtor shall be "acts of bankruptcy" within the meaning of this section, and the fourth of them is, "that the debtor has filed in the prescribed manner in the Court a declaration admitting his inability to pay his debts." Well, it is said that, in a petition under ss. 125 and 126 in the required form given in the schedule to the Bankruptcy Rules, 1870, it is necessary to state—"that your petitioner alleges that he is unable to pay his debts;" and it is said that this is a declaration admitting the debtor's inability to pay his debts within sect. 6, sub-sect. 4, of the Act of 1869. But sect. 6, after prescribing what are to be considered acts of bankruptcy, provides that "no person shall be adjudged a bankrupt on any of the above grounds"—including, therefore, the ground that he has filed a declaration admitting his inability to pay his debts—"unless the act of bankruptcy on which the adjudication is grounded has occurred within six months before the presentation of the petition for adjudication." Now it is admitted that presentation of a petition for liquidation by arrangement or composition is not presentation of a petition for adjudication; but I find that sect. 11 of the same Act provides that "the bankruptcy of a debtor shall be deemed to have relation back to and to commence at the time of the act of bankruptcy being completed on which the order is made adjudging him to be bankrupt; or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to and to commence at the time of the first of the acts of bankruptcy that may be proved to have been committed by the bankrupt within twelve months next preceding the order of adjudication." Then the section goes on, negatively, that the bankruptcy shall not relate to any prior act of bankruptcy unless at the time of such prior act the bankrupt was indebted, and so on.

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(1) 34 W. R. 568.
(2) 10 Ch. D. 76.
(3) 15 Ch. D. 42, 53.

Therefore, the scheme of the Act, in the earlier part of it, I must, for this purpose, take to be this: a declaration filed by the bankrupt of his inability to pay his debts is an act of bankruptcy; but no person shall be adjudged bankrupt on that ground unless the filing of the declaration occurred within six months before the presentation of the petition for adjudication; and, with respect to the relation back, the relation back is to that act of bankruptcy, which must be within six months, or to another act of bankruptcy within twelve months, preceding the adjudication, subject to the provision in the latter part of sect. 11.

Now, what is the meaning and intention of these provisions in the *Bankruptcy Act* of 1869? Obviously they can have no other meaning than this—that you can deal with a bankrupt without any danger of having your dealing treated as a fraudulent preference at any time after six months or at any rate twelve months from the act of bankruptcy have expired, because the act of bankruptcy no longer becomes, to use the phrase which I find in the Act of Parliament, "available for adjudication." He cannot be made a bankrupt in respect of it if six months or twelve months have expired. The only purpose and object of these provisions is to enable third persons to deal with the man safely when they know there has been an act of bankruptcy; and if that has been committed a year before he may say, "That does not matter, because I have a right under the Act of Parliament to deal with you."

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Then I go to sect. 126 of the same Act, and I find there that the creditors of a debtor who is unable to pay his debts may, "without any proceedings in bankruptcy," resolve to accept a composition. Then the section contains various provisions as to meetings, and so on; and the last clause of the section is in these terms: "If it appear to the Court on satisfactory evidence that a composition under this section cannot in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings may be had accordingly."

It was said in argument that the Court cannot adjudge the debtor a bankrupt if he has not committed an act of bankruptcy; and that the only act of bankruptcy which it is contemplated by the Act, or rather by the rules under the Act—for there is nothing in the Act about it—as having been committed by a debtor who presents a petition for liquidation or composition, is the statement in the petition that he is unable to pay his debts; and, consequently, it is said this section means that where the debtor has presented such a petition (it does not matter when or how long ago), followed by composition proceedings, if the Court is satisfied that those proceedings cannot go on further without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and may so adjudge him upon the act of bankruptcy committed in filing the petition. All I can say is, that the Act does not say so; and surely if the Act meant that he was to be adjudged bankrupt on that act of bankruptcy, and that there was to be relation back to that act of bankruptcy, no matter how long it had preceded the adjudication or petition for adjudication, it would have said so; and when I find in another part of the Act such a very careful provision as to the time during which there shall be relation back and as to the interval which may elapse after an act of bankruptcy during which it may be available for adjudication, I should have expected to find in this section this express provision—that, at whatever time the Court under sect. 126 adjudged the debtor bankrupt, there should be relation back, whether it was one year, two years, five years, or twenty years before, to the act of bankruptcy committed by him in filing the petition. In the absence of such a provision it seems to me extravagant to put that construction on the Act of Parliament. The two parts of the Act are, I think, quite reconcilable. If the adjudication comes within six months, or even twelve months, after the filing of the petition for adjudication containing the statement by the debtor, then I conceive that, under sect. 11, the bankruptcy would relate back. That is consistent with sect. 11. But if the interval is greater than that, it seems to me that it would be totally inconsistent with the protection which the Act intends to give to persons dealing with the man who afterwards becomes bankrupt, that there should be any such relation back. That is the construction I put upon the 126th section. I read this section as giving a peculiar power to the Court of Bankruptcy, and I think I see what is meant very plainly. In the petition, the terms of which are given, as I said before, in No. 106, Schedule of Forms to the Bankruptcy Rules, 1870, there is not merely the statement that the petitioner is unable to pay his debts, but there is this statement, "and hereby submits to the jurisdiction of this Court in the matter of such proceedings." I take sect. 126 to mean this—that, although there need be no proceedings in bankruptcy where a debtor is making a composition with his creditors under that section, yet, whether he has committed an act of bankruptcy or not, the Court shall have power, he submitting himself in this way by proceeding under sect. 126, to adjudge him bankrupt, in order to prevent injury as pointed out in the section. That I think is the meaning of the section; and it is idle to contend that the Legislature cannot say that a man shall not be bankrupt without his having committed an act of bankruptcy. The Legislature may provide anything; and here it seems to me clear that what the Legislature intended was to provide under this sect. 126, without reference to any act of bankruptcy whatever, that if the consequences pointed out at the end of the section would otherwise ensue, the Court shall have power to make the debtor bankrupt in order to avoid those consequences.

One of the objections to the argument which has been urged before me to the contrary seems to be this. Those who say there is this relation back to the date of the petition for adjudication rely on one part of sect. 6 of the Act to shew that the statement in the petition is an act of bankruptcy; but they refuse to look at the other part of the section which says that it is only on a petition presented six months afterwards that he can be made bankrupt in respect of that act of bankruptcy. How is it possible to rely upon sect. 6 for one purpose and ignore it for another? Mr. *Winslow,* than whom no one is more experienced in the law of bankruptcy, admits frankly that a petition for liquidation is not a petition for adjudication, and that in the present case the only petition for adjudication, or the only thing equivalent to it, was the application made to the Court by motion, though I am told that formerly it was always done by petition. That motion was made on the 18th of March, 1886, not only six months, but something like six years, after the act of bankruptcy, which therefore was not available for adjudication at that date by the very terms of sect. 6 of the Act.

That is the conclusion which I should come to from such consideration as I have been able to give to the statute during the course of the argument, and, certainly, no authority has been cited to me to the contrary. So far as authority goes, it seems to me that the authorities are rather in favour of that view. There are two cases to which I have been referred, that of *In re Kearley and Clayton's Contract* (1), before Vice-Chancellor *Malins,* and the still more important case of *Ex parte Charlton* (2), which came, first of all, before the Chief Judge in Bankruptcy, who, from the language used by him, seems rather to have thought that there might be relation back, though he did not expressly decide it. But the language of Lord Justice *James* and of Lord Justice *Cotton,* so far as it was addressed to this point, which they were not then obliged to decide, seems at any rate to throw the greatest possible doubt upon the question whether there could be relation back under sect. 126. My conclusion from the Act is, that, in this case, or in any case where the adjudication is more than a year after the presentation of the petition, there is no relation back to the petition.

Then it is said that even if there were a relation back, this case is not one of a fraudulent preference. I confess that this seems to me to be a question of much more doubt. It is not necessary for me here to decide it. But I never shrink from giving my opinion in a case which has been carefully argued before me. The argument is this. It is said that the dominant motive of *McHenry* in making this arrangement in August 1879 was, not to prefer *Sharp*, his creditor, before his other creditors, but to obtain for himself and for the creditors an advantage by the further advance of £5000; and certain cases were cited which were very peculiar cases. There were cases in which a bankrupt, or an intending bankrupt, had, among other creditors, some who became such by reason of a breach of trust by him, for which he might have been punished by criminal proceedings; and in fear of those criminal proceedings he did in fact prefer the particular creditor by obtaining money and paying him off. It was said there that the dominant motive was, not to prefer that creditor, but to relieve himself from the possible consequences of his criminal act, and that, therefore, this being the dominant motive, there was no fraudulent preference. I must bow to those authorities, which are binding on me; but I must confess that the proposition is, to my mind, somewhat startling. A man says, "I will prefer you to my other creditors by paying you off, you being the creditor having the power not merely of recovering your debt but of subjecting me to the consequences of a criminal prosecution." In order to avoid that he voluntarily pays the creditor off, and it is said that that is not voluntarily done. Of course there is no pressure in the case or it would not be voluntary. It was in this sense a perfectly voluntary preference to pay that particular creditor. But it was said that, the dominant motive being, not to give the creditor an advantage, but to obtain an advantage for the debtor by relieving him from the criminal proceeding to which he would otherwise have been subject, it is not a fraudulent preference. But does that apply in a case like this? In the course of the argument I put this obvious question—Suppose a debtor goes to one of his creditors and says, "Now if you will give me a sum of money I will give you security for your debt which will prefer you to other creditors," would not that be a voluntary preference? And the answer was,

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(1) 7 Ch. D. 615.

(2) 6 Ch. D. 45.

If it was a comparatively insignificant sum it would; but if it was a large and substantial sum then it would not. Still, that is a very indeterminate line to draw; and I should certainly hesitate long before I held that, if a debtor went to his creditor and said, "If you will give me £500 I will give you security," that would be a fraudulent preference; but that, if he said "If you will give me £5000 I will give you security," that would not be a fraudulent preference. I confess I do not think the authorities go so far as that. Therefore, I have chosen, first of all, to deal with the question whether there was relation back or not, because, if my decision had turned on this other point, I certainly should have reserved my judgment, and considered the point more carefully. I will not say more than that about it.

But, then, various other objections are raised. An objection is raised to the first bill of sale upon the ground that the copy which was filed of that bill of sale was not a true copy. Now the reason why it was said not to be a true copy was this: In that copy there were certain blanks. I have the document before me which has been sent from the registry office. [His Lordship read it, and proceeded:—] It is said that those blanks in the copy filed are fatal, because they make the copy not a "true copy," those blanks not occurring in the original mortgage. Well, in the first place, one must ask oneself, Is it possible that any human being could be mistaken as to the effect of the document? Is there any wrong or damage which could arise to anybody from the blanks being left? In one sense it is not a "true copy," because the blanks are not in the original bill of sale. But supposing the blanks had been in the original bill of sale, would it have been void? Could any one reasonably maintain in a Court of Justice that the original bill of sale would have been in the least degree affected if the blanks had been there? In my opinion it could not; and a Court of Justice is not so bound hand and foot as to come to the conclusion that this is a fatal defect if, supposing that these blanks were in the original bill of sale, the validity of the deed would not be in the least degree less effective.

Then is there any untruth in this copy—untruth, I mean, upon an intelligent understanding of the *Bills of Sale Act*? In my opinion there is not. A true copy of a thing means a copy which is true in all essential particulars; the mere fact that a copy contains a blank which is immaterial, and cannot mislead anyone as to the effect of the instrument, does not make the copy an untrue copy within the meaning of the Act. Therefore I think that this is only one of those attempts to escape from a debt otherwise due which the Court will not favour.

But then a much more serious question is raised upon the bill of sale; I say "more serious," looking at the extreme strictness with which the Courts of Law in some cases have construed the *Bills of Sale Acts*. Here the bill of sale contains a description of the grantor as "of *Oak Lodge, Addison Road*, in the county of *Middlesex*, contractor and financial agent." He was "of *Oak Lodge, Addison Road*, in the county of *Middlesex*." So far the description is quite right. But it is said he was not a "contractor and financial agent."

Sect. 10, sub-sect. 2 of the *Bills of Sale Act*, 1878, is in these words. [His Lordship read the sub-section, and continued:—] Now, the question as to what is a proper description of a grantor of a bill of sale came before a Judge for whose strong common sense we all have a great respect, Mr. Baron *Martin*. It was not decided under this very Act of Parliament, but under an Act containing similar words. I refer to the case of *Tuton* v. *Sanoner* (1). Before I read the language of the learned Judge which I am going to read, I will just state that there the bill of sale was under the statute 17 & 18 Vict. c. 36, which required an affidavit to be filed containing the description of the occupation of every attesting witness to the bill of sale; and it was held that it was not a compliance with the statute to describe as "gentleman" (which, be it observed, is not an occupation) a witness who, though formerly an attorney, was at the time of the attestation acting as an attorney's clerk. That is, he had an occupation which he did not describe, but he described himself merely as "gentleman," which was equivalent to saying that he had no occupation. The learned Judge said this: "We think that question" (whether the description was sufficient) "has been already concluded by the case of *Allen* v. *Thompson* (2), and if the matter were to come before us *de novo*, we should be of the same opinion. The witness had an occupation which ought therefore to have been stated. The definition (in *Webster's* Dictionary) of 'an occupation' is — 'the principal business of one's life; vocation; calling; trade; the business which a man follows to procure a living or obtain wealth.'"

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(1) 3 H. & N. 280, 282.

(2) 1 H. & N. 15

There are a good many other cases which have been cited on this point, but I am not going to criticise them; for I would much rather decide this case, which is a little different from any of them, on what I conceive to be the true principle applicable to it. From the evidence before me—and I am certainly a little influenced by the notoriety of the name of Mr. *McHenry*—these facts are proved. Mr. *McHenry* was called as a witness by the Defendants, and he was asked what he was. He said he was a "contractor and financial agent." By "contractor" he explained that he meant contractor for the building of railways and other public works; and by "financial agent" he explained that he meant that he had been engaged in large financial agencies for the *Erie Railway Company* and other companies, and that he was active in carrying on that business of a financial agent down to and in the year 1874, when the *Erie Company* repudiated the connection between him and them. Then he said the litigation between the *Erie Company* and himself began and absorbed all his time and attention from that time. But that he had formally abandoned his vocation of a financial agent there is not a tittle of evidence before me to shew. On the contrary, he says that in the year 1881, no doubt after this bill of sale, he again did considerable business, for which he got payment amounting to £3000 as financial agent for another American company. Is it or is it not a true description? I observe that the word "true" is not appended to that part of the provision in the section I have read, which relates to the "description of the residence and occupation" of the grantor of the bill of sale. Although it is used in reference to the "copy" to be filed, the word "true" is not used here; so that there is no emphatic word used. However, of course there must be a proper description of the occupation of the man who gives the bill of sale. But was this an untrue description? What is the object of having the occupation stated? It has been said in many cases that the object is to identify the individual so as to shew beyond question who is meant by the individual indicated. Now, could there be any description which would identify this gentleman better than that of "contractor and financial agent," although he had not been carrying on the business of contractor and financial agent since the year 1874, when the *Erie* repudiation took place? I conceive there could not; and I confess I very much agree with the argument of Sir *Horace Davey* on that point—that if he had been described in any other way it is very probable, indeed, that the objection would have been raised that he had not been properly described. To my mind, you could not have identified this individual—*McHenry*—more certainly, so far as his occupation is concerned, than by describing him as "contractor and financial agent"; and, in my opinion, it was not untrue so to describe him, although he had not, in fact, been carrying on either of those businesses, except so far as he had been litigating in that character with the *Erie Company*, since 1874. To take an illustration from a humbler position in life: Supposing a labouring man or a bricklayer had been laid aside for a year or two from some cause, such as illness, would it be inaccurate for him to describe himself as a labourer or bricklayer? No one could say that it would. The object of the description is to identify the man: in his own village or neighbourhood the man would be known by that description and would be called "so and so" the bricklayer, or "so and so" the labourer, whether he was actually bricklaying or labouring, or whether he had been prevented from bricklaying or labouring for some time by some cause or other of a temporary kind. So in many other cases; though I do not refer to those cases where a description is more or less indelible, such as "barrister" or "surgeon"; but in cases where the business is of necessity an intermittent business, like that of a contractor or civil engineer, or like that of a surveyor or land agent, it is not untrue to describe the man as contractor, civil engineer, surveyor, or land agent, because, for some reason more or less cogent, he has been prevented for some time from acting in that profession. In deciding this point, I regard this as the sole consideration—what are the meaning and purpose of this part of the provision of the Act of Parliament? The meaning and purpose are to identify the man. If the description gives one a true indication of his vocation in life, by which he can well be identified, to my mind it is no answer to say he was not actually carrying on that business at the time, or that he had not been doing anything in his business for a year or two before. I do not think that is an answer; and therefore I hold that this objection to this bill of sale does not and ought not to prevail.

So much for some of the questions raised. I confess I had some doubt whether this is a case in which the Court ought to be satisfied that the whole amount specified in the mortgage and bill of sale was due, and whether there ought not to be in this action, which is an action for enforcing the securities, an inquiry what amount was *bonâ fide* due at the date of the securities. Possibly it might be said that the award was not a real award between the parties, but that it was a thing done by arrangement, and that, as to the £19,000 odd then agreed to be due to the Plaintiff *Sharp*, that was a matter which was not so concluded as not to be open to inquiry. I had some doubt whether an inquiry ought not to be directed, whether any and what sum beyond the £5000, which it is clearly proved by the evidence before me had been advanced, was due at the date of this bill of sale and mortgage. But, upon reflection, I think I ought not to do that. In the first place, a peculiar point of that kind should have been specifically pleaded, and there is no plea at all which raises the statute of *Elizabeth* in any way so that anybody could understand it; and, moreover, I am thoroughly satisfied that the transaction which took place in August, 1879, was completely *bonâ fide*. I am satisfied there had been considerable investigation before that time by the arbitrator and his accountant of the claim of *Sharp* against *McHenry*, and that the arbitrator was himself satisfied, when the arrangement was made in August, 1879, that the £19,000 odd which Mr. *McHenry* no longer contested, was in point of fact due, and I think that the pleading has not only not raised this point, but has omitted to do so advisedly, because it is obvious there was no evidence upon which the point, if raised, could have been supported. For that reason, even if it were asked, which has not been done, that

I should now allow the record to be amended, I do not think it would be right to allow the record to be amended so as to raise any point of that kind. Accordingly, I think that the securities which, *primâ facie*, of course, are good securities for the amount stated in them to be due, are proved, upon the whole of the evidence before me, to be securities for a sum of that amount which was *bonâ fide* due in the opinion of both parties to the mortgage, and that therefore they should not be disturbed.

Then I come to the consideration of another point, which, I confess, struck me, when it was opened, as being one which could not be maintained; but, upon reflection, I think there is a great deal more in it than I thought at the first moment, and that is this: I have already stated in the narrative that upon the 3rd of July, 1885, a further bill of sale was given in pursuance of a long contract entered into on the 22nd of June, 1885. [His Lordship then read the contract to the effect above stated, and continued:] Now this bill of sale was undoubtedly given under that contract; but, of course, when the bill of sale came to be framed, the draftsman became instantly aware that it was impossible to make a good bill of sale in those terms; so what he has done is ingenious enough: instead of making a bill of sale according to the contract, he has taken out of this contract so much as could be embodied in a valid bill of sale, and given a bill of sale for that part. Now the *Bills of Sale Acts*, as every one knows, provide that a bill of sale shall be void unless it contains certain things; and, therefore, whenever you have a bill of sale brought in question, you are, from the necessity of the case, obliged to look into the transaction which preceded the bill of sale, to see whether it was a *bonâ fide* document. I thought at first, I confess, that the attempt to introduce this evidence was improper, and that it could only be done in an action for rectification, but it did not, at the moment, occur to me that, this bill of sale being impeached by the Defendants, in order to impeach that bill of sale it was legitimate to shew what the real contract between the parties was, and that the bill of sale did not properly carry it out. It seems, however, that this was so held in the case of *Simpson* v. *Charing Cross Bank* (1) before the Divisional Court. There a bill of sale was executed to secure £200 to the defendants, repayable by twenty-four equal monthly instalments of £8 6*s.* 8*d.*, together with interest at the rate of 25 per cent. At the same time the defendants took from the plaintiffs a promissory note of even date for £280, to be repaid by twenty-four monthly instalments of £13 odd. The bill of sale was registered; the promissory note was not. The promissory note contained the following words: "And on the failure of any one instalment the whole balance remaining unpaid to become due and payable forthwith." Default having been made in payment of the fourth instalment, the defendants took possession of the plaintiffs' effects under the bill of sale. Then the question was whether this bill of sale was valid. It was held not to be valid, and for the following reasons, which are given by the learned Judges: "The bill of sale has been carefully drawn, and avoids illegality. So far it appears to be a good bill. But it and the promissory note are contemporaneous documents, and refer to the same matter; and, by the promissory note, on the failure of one instalment under the bill of sale the whole amount charged on the promissory note is to become due. The bill of sale is bad, as not shewing the true agreement which was really entered into between the parties." Then the learned Judge whom I have quoted refers to *Ex parte Odell* (1), which did not exactly decide the same point, but in which there are expressions upon which this judgment might be well founded, and he continues: "This bill of sale is ingenious in evading the *Bills of Sale Act*, and it would, by means of the promissory note, enable the holder of the bill of sale, on failure of payment to him of the first instalment, to claim the full amount from the plaintiffs. The two documents cannot stand together, and, if all the terms were inserted into one document, that document would be bad"; that means, if they were all in the bill of sale. And the other learned Judge concurs, and says, "The registration refers, therefore, to an imperfect bill of sale."

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(1) 34 W. R. 568.

In the present case, I have not only this agreement, but a deed of covenant which does practically follow out the agreement, and which was dated on the 6th of July, this bill of sale being dated the 3rd. These documents all refer to the same transaction. Therefore, what I have actually before me is this: Here was an agreement, not only capitalising the interest then due, but making a future arrangement for payment of compound interest, and there was to be a bill of sale to secure that arrangement; but when that bill of sale came to be prepared, the draftsman, seeing it could not be done so, modified the terms of it by framing it in a proper form, and leaving out the material part of the arrangements, which, however, was not abandoned, because it appears in the deed of covenant which was executed three days afterwards. That is very ingenious; but, I believe, in accordance with the decision to which I last referred, with which I agree, and which I should respect if I did not agree with it, that this is a mere attempt to satisfy the *Bills of Sale Act* by putting only part of the agreement into the bill of sale, but without making any real alteration in the agreement. I do not think that this can be done; and I think that the Court, looking at the tricks which are played in bills of sale (I do not characterize this transaction as such), has a right to examine with great care a transaction of this kind before it allows it to be valid. In my opinion, therefore, this objection, without going further, to the second bill of sale is a valid one, and that this bill of sale must be treated as being a void document.

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(1) 10 Ch. D. 76.

The result is, that the action of *Sharp* v. *Brown* must be dismissed with costs, and that in *Sharp* v. *McHenry* the Plaintiff is entitled to the usual judgment in a mortgagee's action for accounts, with costs; the costs in both actions to be set off.

Solicitors: *C. & S. Harrison & Co.; Munns & Longden.*

G. I. F. C.

KAY, J.
1888
Feb. 9.

In re BROUGH.
CURREY *v.* BROUGH.

[1887 B. 5811.]

Will—Revocation—Special Power of Appointment—Subsequent Revocation of Gifts "in favour of" Donee of Power.

A testator by his will gave to his sister *H.* a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever "in favour of" *H.*:—

Held, that the power was revoked as well as the life interest.

ADJOURNED SUMMONS.

James Brough, who died in 1876, by his will, dated the 22nd of November, 1875, gave his residuary estate to trustees, upon trust as to the income for his four brothers and sisters, *Thomas*, *John*, *Harriet*, and *Anne*, and the survivors and survivor of them, and after the death of the survivor of them upon trust as to one-fourth share of capital "for all or such one or more exclusively of the others or other of the children of my late brothers, *Arthur* and *William*, as my said sister *Harriet* shall by will appoint;" and, in default of appointment, upon trust "for all such children or child as shall be living at the death of the survivor of my said brothers *Thomas* and *John* and my sisters *Harriet* and *Anne*, and the children of such of them as shall be then dead, such last-mentioned children to take equally between them the share to which their parent would have been entitled if living."

The testator made five codicils to his will, of which the first four contained no devises or bequests in favour of his sister *Harriet Brough*, and the fifth, which was dated the 15th of June, 1876, contained the following clause: "I revoke all devises and bequests whatsoever contained in my will or codicils in favour of my sister *Harriet Brough*."

Harriet Brough survived the testator, having made a will, the terms of which rendered it doubtful whether or not the same operated as an execution of the special power of appointment given to her by the will of *James Brough*, assuming that such power was not revoked by the codicil of June, 1876.

This summons was taken out by the trustees of the will of *James Brough*, raising the question (amongst others), whether the codicil of June, 1876, operated as a revocation of the special power of appointment given by the testator's will to *Harriet Brough*.

S. Dickinson, for the trustees.

Marten, Q.C., and *Wace*, for the persons entitled in default of appointment:—

The special power given by the testator's will to his sister *Harriet* was a bequest "in her favour" within the meaning of the words of the codicil of June, 1876, and was therefore revoked by that codicil.

R. F. Norton, for persons claiming under the will of *Harriet Brough*:—

The special power of appointment given to *Harriet* was not a bequest "in her favour," as no actual beneficial interest was thereby conferred on her.

Simmonds, and *Leverson*, for other parties.

Kay, J. (after referring to the will and codicils of the testator *James Brough*, continued):—

Beyond all doubt the life estate given to *Harriet Brough* by the will was revoked by the fifth codicil. But the question is, what became of the power of appointment? Was it revoked or not? That depends upon whether it is to be considered as a devise or bequest "in favour of" *Harriet*. Some people might consider that it was a burden rather than a benefit, but the question is what the testator intended. Did he intend this to be "in favour of" *Harriet* or not? A person who gives to another the power of disposing of a considerable part of his residuary estate must, in my opinion, be supposed to intend to confer on that person a favour; and the meaning of the word "favour" in this codicil is what the testator intended it to be. I cannot doubt that he considered that the power of appointment which he gave to *Harriet* was a devise or bequest in her favour, and

KAY, J.
1888
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when he revoked all devises and bequests whatsoever contained in his will or codicils in favour of *Harriet*, I cannot doubt that he meant to revoke the power of appointment. Accordingly as to this share the gift in default of appointment must take effect.

Solicitors: *Ullithorne, Currey, & Villiers*, agents for *Barber, Currey, & Brough, Derby*; *Crowders & Vizard.*

C. C. M. D.

KAY, J.
1888
March 5, 6, 7, 8, 15.

BARTON *v.* NORTH STAFFORDSHIRE RAILWAY COMPANY.

[1886 B. 5898.]

Railway Company—Shares or Stock—Forged Transfers—Forgery by one Executor—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3 [*Revised Ed. Statutes, vol. i., p.* 705]—*Partnership—Action by Shareholder or Partner—Executors, Powers of—Transfer of Stock—Companies Clauses Act*, 1845 (8 *Vict. c.* 16), *ss.* 14, 20 [*Revised Ed. Statutes, vol. ix., pp.* 567, 568]—*Form of Action.*

One of two executors cannot make a valid transfer of railway shares or stock registered in the names of both, under and subject to the provisions of the *Companies Clauses Act*, 1845.

Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor, a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred more than six years before the action was brought:—

Held, that the cause of action was the refusal by the company, when the forgeries were made known to them, to treat the Plaintiffs as owners of the stock, and that, therefore, time under the *Statute of Limitations* would not begin to run against the Plaintiffs until such refusal:—

Held, also, that the Plaintiffs were entitled to treat the transfers as nullities, and that the company must be ordered to register the Plaintiffs as owners of the stock.

PREVIOUSLY to the year 1880 three sums of £3000 and £2000 consolidated or ordinary stock, and £1090 preference 5 per cent stock, of the Defendants, the *North Staffordshire Railway Company*, were registered in the names of *Thomas Barton* and the Plaintiff, *Ann Barton.*

This stock formed part of the estate, and was subject to the trusts of the will, of *Samuel Barton*, who died on the 2nd of January, 1870. *Thomas Barton* and *Ann Barton* were the executors and trustees of the will.

At various times during the years 1880 to 1885, *Thomas Barton*, without the knowledge of *Ann Barton*, sold portions of the stock, and signed and executed transfers thereof to the several purchasers. In the case of each transfer he forged the signature of *Ann Barton* and also that of the attesting witness, who was a clerk in his employ, but had since died.

The transfers were effected by eleven deeds, whereby the following sums of stock were or purported to be transferred on the following dates:—£1000 ordinary stock on the 31st of July, 1880; £1000 like stock on the same day; £700 like stock on the 28th of February, 1881; £300 like stock on the same day; £1000 like stock on the 16th of July, 1881; £200 preference stock on the 17th of February, 1882; £200 and £150 like stock on the same day; £540 like stock on the 22nd of March, 1882; £800 ordinary stock on the 30th of September, 1882, and £200 like stock on the 18th of July, 1885.

The transfers were registered in due course by the railway company, and the proceeds of sale were, unknown to *Ann Barton*, received by *Thomas Barton*, and applied by him to his own purposes; but he continued to pay the amount of the dividends to the persons respectively entitled down to the end of 1885.

Ann Barton remained ignorant of the forgeries until May, 1886, when she accidentally discovered them.

On the 14th of June, 1886, *Ann Barton* wrote to the secretary of the railway company asking whether the stock was still standing in the names of herself and *Thomas Barton*, and the secretary wrote in reply stating that the stock had been transferred by transfers signed by herself and *Thomas Barton*, and giving particulars of the amounts so transferred and the dates of registration of the transfers.

On the 1st of July, 1886, a deed was executed by *Thomas*

Barton, whereby the Plaintiff, Mrs. *Elizabeth Ashe*, was appointed a trustee of the will of *Samuel Barton* in the place of *Thomas Barton*.

On the 17th of July, 1886, *Thomas Barton* left this country.

On the 26th of August, 1886, the solicitor of the Plaintiffs, *Ann Barton* and *Elizabeth Ashe*, wrote to the railway company stating that the transfers were alleged to have been forged, and claiming that the Plaintiffs were still stockholders. This contention not being acceded to, on the 10th of December, 1886, the writ in this action was issued against the railway company.

The Plaintiffs claimed that the railway company might be ordered to appropriate or purchase and to transfer to and register in the names of the Plaintiffs £5000 consolidated stock, and £1090 preference 5 per cent. stock of the company.

The railway company by their defence denied that the transfers were forged, and alleged that they were valid. Issue having been joined, the action now came on for trial. At the trial the company obtained leave to plead, by amendment of their defence, the *Statute of Limitations*.

Purchasers of the stock were brought into the action as third parties, but an order was made directing that the question of their liability should be determined at a future time.

Rigby, Q.C., *Renshaw*, Q.C., and *Whitaker*, for the Plaintiffs:—

The forged transfers were nullities, and the Plaintiffs are, therefore, entitled to have the stock replaced in their names: *Bank of Ireland* v. *Evans's Trustees* (1); *Davis* v. *Bank of England* (2); *Sloman* v. *Bank of England* (3); *Johnston* v. *Renton* (4); *Swan* v. *North British Australasian Company* (5); *Carshore* v. *North Eastern Railway Company* (6); *Taylor* v. *Midland Railway Company* (7); *Hibblewhite* v. *McMorine* (8); *Tayler* v. *Great Indian Peninsula Railway Company* (9); *Société Générale de Paris* v. *Walker* (10); *Companies Clauses Act*, 1845 (8 Vict. c. 16), ss. 14, 20.

(1) 5 H. L. C. 389.
(2) 2 Bing. 393.
(3) 14 Sim. 475.
(4) Law Rep. 9 Eq. 181.
(5) 2 H. & C. 175.
(6) 29 Ch. D. 344.
(7) 28 Beav. 287.
(8) 6 M. & W. 200.
(9) 4 De G. & J. 559.
(10) 11 App. Cas. 20.

Sir *Charles Russell*, Q.C., *Marten*, Q.C., and *Farwell*, for the Defendants, the railway company :—

The company, having before them these transfers purporting *primâ facie* to be valid, and being in fact properly signed at least by the leading executor and trustee, were bound to give effect to them. This action is in the nature of an action on the case for breach of duty, and therefore falls within sect. 3 of the *Statute of Limitations*, 21 Jac. 1, c. 16, which provides that an action on the case shall be commenced and sued within six years next after the cause of such action, and not after.

Accordingly, as regards the stock which was transferred more than six years before action brought, the Plaintiffs' claim is barred by the statute, which applies to an action by one partner against his co-partners: *Knox* v. *Gye* (1); and therefore to an action by a stockholder against the company. Time under the statute began to run when the stock was transferred, and not when *Ann Barton* discovered the forgeries: *Granger* v. *George* (2); *Short* v. *M'Carthy* (3); *Howell* v. *Young* (4); *Smith* v. *Fox* (5); *Wilkinson* v. *Verity* (6). It is only where the concealment is by the defendant that time runs from the date of discovery: *Gibbs* v. *Guild* (7). The observations of *Best*, C.J., in *Davis* v. *Bank of England* (8), so far, if at all, as they are against us, were mere *obiter dicta;* moreover, that case was reversed in error (9).

Again, we submit that, so far as the company are concerned, the execution of the transfers by one of the two executors was a sufficient discharge, according to the principle of *Charlton* v. *Earl of Durham* (10): *Simpson* v. *Gutteridge* (11). Under sect. 20 of the *Companies Clauses Act*, 1845, a company is not affected by notice of any trust; so that, regarding *Thomas Barton* simply as one of two joint stockholders, it would seem that he could, under sect. 14, make an effectual transfer at least of one-half of the stock.

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(1) Law Rep. 5 H. L. 656.

(2) 5 B. & C. 149.

(3) 3 B. & Al. 626.

(4) 5 B. & C. 259.

(5) 6 Hare, 386.

(6) Law Rep. 6 C. P. 206.

(7) 8 Q. B. D. 296; 9 Q. B. D. 59.

(8) 2 Bing. 393.

(9) 5 B. & C. 185.

(10) Law Rep. 4 Ch. 433.

(11) 1 Madd. 609, 616.

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[*Renshaw*, Q.C.:—The unsoundness of that argument is expressly pointed out in *Sloman* v. *Bank of England* (1).]

[They also referred to *Vorley* v. *Cooke* (2).]

Swinfen Eady, for the third parties.

Rigby, in reply:—

The *Statute of Limitations* has no application. No case was ever heard of in which a company resisted a claim by a shareholder as such merely on the ground that he had been quiescent for more than six years. *Knox* v. *Gye* (3) only applies where the partnership has been dissolved. It is no authority for the proposition that while a partnership is continuing a claim between the partners is affected by the statute. In such a case time under the statute will not run until there is some act of exclusion of the plaintiff by his co-partners or by the company in which he is a shareholder. The judgment of *Best*, C.J., in *Davis* v. *Bank of England* (4) was not in any way affected by the reversal in error: *Coles* v. *Bank of England* (5); *Sloman* v. *Bank of England* (6).

March 15. Kay, J. (after stating the facts of the case and reviewing the evidence, which he held clearly established the charges of forgery, continued as follows):—

The real claim of the Plaintiffs is to be treated by the railway company as stockholders. They say, and I agree with the contention, that the forged transfers must be considered as nullities.

One defence raised by amendment is a plea of the *Statute of Limitations*. The actual Plaintiffs are *Ann Barton* and Mrs. *Ashe*, who was appointed her co-trustee by the deed of the 1st of July, 1886, in the place of *Thomas Barton*.

This suit was instituted on the 10th of December, 1886, more than six years after some of the attempted dealings with this stock.

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(1) 14 Sim. 475, 488.
(2) 1 Giff. 230.
(3) Law Rep. 5 H. L. 656.
(4) 2 Bing. 393.
(5) 10 A. & E. 437.
(6) 14 Sim. 475.

It is settled that, after a partnership has ceased, any claim on simple contract by one former partner against the others in respect thereof is, *primâ facie*, subject to be barred after the expiration of six years: *Knox* v. *Gye* (1). On the other hand, while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of Lord Justice *Lindley* is to the contrary (*Lindley* on Partnership (2)). In a case of exclusion time would begin to run from the act of exclusion.

It has been argued in this case that if a partner does not draw his share of profits or act as partner for six years he, at the end of that time, loses all remedy against his co-partners, and therefore practically ceases to be a partner. And it is urged that this being the case as to a partnership, the analogy ought to be followed in railway companies and other trading corporations, and that a shareholder or stockholder who makes no claim for six years has no remedy in respect of his shares or stock against the company. If this be so, any such company might direct that after six years' silence a pen should be drawn through the shareholder's name on the register, and he would practically cease to be a member of the corporation; and in answer to a question from the Court, the argument was pressed to that extent. Such a conclusion shews that there must be a fallacy in the premises. I know of no authority for saying that a partner who does nothing for six years loses all remedies against his co-partners. Time only begins to run against him from an act of exclusion. If the analogy be applicable there must be a similar act in the case of a shareholder to enable the company to avail itself of the statute against him. Nothing of the kind took place here until the resistance by the company to the claim made in this action. The cause of action is, not the invalid transfers of the stock in question, but the refusal of the company, when the forgery was made known to them, to treat the Plaintiffs as stockholders. It is an elementary principle that time does not begin to run until there is a complete cause of action, and there was no complete cause of action in this case until such refusal.

In *Davis* v. *Bank of England* (3) there is a judgment of

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(1) Law Rep. 5. H. L. 656.
(2) 4th Ed. p. 966.
(3) 2 Bing. 393.

Best, C.J., in which the question of the *Statute of Limitations* in a similar case is considered. The facts of that case somewhat resembled the present. Certain sums of consols and other Government securities standing in the name of the plaintiff had been sold under forged powers of attorney. The plaintiff sued the *Bank of England* in an action on the case for permitting the transfer without his authority and for refusing to pay him dividends. The action was brought within six years from the date of the sales, so that no decision on the question of the *Statute of Limitations* was necessary, but in the judgment *Best*, C.J., said (1): "We cannot do justice to this plaintiff unless we hold that the stocks are still his . . . . Another consequence of the stocks being considered as transferred will be most alarming to those who live at a distance from *London*, and receive their dividends by attorney; namely, that their claim to compensation in case their stocks should be transferred without their authority may be barred by the *Statute of Limitations*." Later on he says (2): "If the plaintiff's action had been founded on the concealment of the forgeries, it could not have been supported. But the action is founded on the refusal of the bank to pay on demand the dividends of the plaintiff, due on stocks belonging to him;" and judgment was given for the plaintiff accordingly.

That decision was reversed in error upon the ground that there was no allegation in the declaration and no finding in the verdict that the bank ever had received the dividends from the Government. But the judgment of *Best*, C.J., has not been considered as affected by such reversal: *Coles* v. *Bank of England* (3); *Sloman* v. *Bank of England* (4).

Then it was suggested that *Thomas Barton* and *Ann Barton* being co-executors, one of them alone could have transferred the stock which was registered in the names of both. No authority for this proposition was cited, and I am clearly of opinion that, whatever the powers of executors may be as to other property vested in them in that character, they have no such power as to railway shares or stock, which are governed by the *Companies Clauses Act*. With respect to these their rights and liabilities, as

(1) 2 Bing. 405.
(2) Ibid. 410.
(3) 10 A. & E. 437, 449.
(4) 14 Sim. 475, 486.

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between themselves and the company, are the same as those of other shareholders, and the company is expressly exonerated by sect. 20 from being bound to see to the execution of any trust.

The next argument was that if they are to be treated as joint holders of the stock, the transfers must be good as to one moiety, because it is not denied that they were executed by *Thomas Barton*. This was answered by the late Vice-Chancellor of *England* in *Sloman* v. *Bank of England* (1). If the transfers were were good as to one half, the other half would remain in the names of the two, and he might then transfer one moiety of that, and so on until the residuum was infinitesimal.

Another consideration, which was not pressed at the Bar, but which I cannot overlook, is that it may be said that this action is practically brought by *Thomas Barton*, as one of the co-Plaintiffs. Mrs. *Ashe* has been appointed a trustee in his place. Of course she is not executrix of *Samuel Barton*, but she and *Ann Barton* are suing as co-trustees of the will, and, as far as the legal interests in this stock are concerned, the suit may be said to be the same as a suit by or in the names of *Thomas* and *Ann Barton*. One of two joint owners having forged the name of the other to transfers, the two then come and say those transfers are nullities. Doubtless they are; but could *Thomas Barton* be heard to say so, and, if not, how does this estoppel affect *Ann Barton?* I apprehend that the answer is that in equity *Ann Barton* has sufficient interest to enable her to sue, making *Thomas Barton* a Defendant. Of course, if he were here, the company might have remedies against him personally—criminal and civil. But at the suit of *Ann Barton* they could not deny that the stock had not been validly transferred. This seems to have been taken for granted in more than one case.

In *Sloman* v. *Bank of England* (2) Government stock standing in the names of two trustees was sold by one of them under a forged power of attorney. The bill was filed by the other trustee and the beneficiaries, suggesting that the only remedy was in equity, for, if an action had been brought, it must have been in the joint names of the two trustees, one of whom had fraudulently

(1) 14 Sim. 488.

(2) 14 Sim. 475.

sold the stock. It was held by the Vice-Chancellor of *England* (1) that relief could be had in equity because the other trustee could say against the Bank "stock stood in my name . . . and I have not authorized the transfer of it, you are responsible to me,—that is to say, you must make the account stand as it ought to have stood."

And in *Taylor* v. *Midland Railway Company* (2), where stock of the *Midland Railway Company* standing in the names of *Taylor* and *Bright* was attempted to be transferred by *Bright* by a deed of transfer to which he forged the name of *Taylor* after *Taylor's* death, his legal personal representatives were held entitled to recover his share of the stock against the railway company, and this was affirmed in the House of Lords (3), and it was distinctly decided that there was a right to sue in equity even if the right at law was gone by the death of *Taylor* in the lifetime of *Bright*.

It was suggested that the pleadings should be amended by allowing a counter-claim on the ground that the money for the purchase of the stock was properly paid to *Thomas Barton* as one of two executors. The answer is obvious. The money was not paid by the railway company, but by the purchasers of the stock, with whose rights I am not now dealing in any way. Another answer is that, if the railway company could make any claim to this money, that claim must be made against *Thomas Barton*, not against the estate of the late *Samuel Barton*. The claim must proceed upon an admission that the money was obtained by forgery and fraud. How could the estate be made liable for it? I cannot permit such an amendment.

The defence as actually framed denies the forgery, and also pleads that the loss has been occasioned by the negligence of *Ann Barton*. This latter point was not insisted on at the Bar, and, I think, properly, for it seems to me that no such case of negligence is established by the evidence. Upon the whole, I am of opinion that the Plaintiffs have made out their case, and are entitled to a declaration that the alleged transfers were invalid by reason of the forgery of the name of *Ann Barton* as a

(1) 14 Sim. 487.

(2) 28 Beav. 287.

(3) 8 H. L. C. 751.

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person executing the same, and the railway company must be ordered to register the Plaintiffs as owners of the stock.

No doubt the matter deserved the closest investigation, and it was quite natural that the railway company should desire to have it formally tried. But the present Plaintiffs are, I think, free from all blame, and, as my opinion upon all the points raised is in their favour, I think they are entitled to judgment, with costs. I observe that the costs were given to the plaintiff in *Sloman* v. *Bank of England* (1).

Solicitors: *Stephens & Stephens*, agents for *Hand, Macclesfield; Burchell & Co.; Taylor, Hoare, & Box.*

G. I. F. C.
C. C. M. D.

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(1) 14 Sim. 475.

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April 23, 24.

In re FRYMAN'S ESTATE.
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[1886 F. 1119.]

Bankruptcy Act, 1883, *ss.* 42, 125—*Administration—Order of Adjudication—Distraint for Rent.*

Upon the construction of sects. 42 and 125 of the *Bankruptcy Act*, 1883, an order obtained in the Chancery Division by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bankruptcy, is not equivalent to or included in the term "order of adjudication" (sect. 42) so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order.

ADJOURNED SUMMONS.

Egbert Fryman, who carried on the business of wine and spirit merchant at *Rye*, died on the 29th of March, 1886, having by his will appointed his widow, the Defendant, *Caroline Fryman*, his executrix.

The Plaintiff was the father of *Egbert Fryman*, and until the end of 1874 was the owner of the business, from which he then, as it was alleged, retired in favour of his son, to whom, by lease of the 1st of January, 1875, he demised the business premises for a term of fourteen years from Christmas, 1874, at the rent of £100 per annum for the first ten years of the term, and £50 per annum during the last four years. Other arrangements were also made at the time, under which the Plaintiff purported to sell the business at a price fixed by valuation at £2000, and took a mortgage for the amount of the purchase-money.

No rent was ever paid to the Plaintiff under the lease of January, 1875.

On the 12th of July, 1886, Plaintiff, on behalf of himself and all others the unsatisfied creditors of *Egbert Fryman* deceased, issued a summons for the administration of his estate, and on the 16th of November, 1886, the usual administration order was made.

On the 11th of December, 1886, upon the application of the

Plaintiff—who claimed to be a creditor on the estate for the sum of £1067 5*s*. 10*d*., the whole amount of rent due from the 25th of December, 1875, to the 29th of September, 1886, under the lease of the 1st of January, 1875—it was ordered that Plaintiff be at liberty to distrain for the sum of £475 12*s*. 6*d*., being five and three quarters years' arrears of rent due from the estate of the testator on the 29th of September, 1886 under the lease, but without prejudice to any question, including the question whether liberty to distrain ought to have been given; and in lieu of the distress it was ordered that £475 12*s*. 6*d*., being a sum equal to the amount of the last five and three quarters years' rent, be carried over out of the fund in Court (a sum of £966 representing the proceeds of the testator's personal estate) to an account entitled "The Proceeds of Plaintiff's Distress;" Plaintiff not to be prejudiced by reason of his not having actually distrained, should the Court be of opinion upon argument that the leave was rightly given.

Plaintiff had applied by summons (now adjourned into Court) that the fund in Court to the credit of the action, "Proceeds of Plaintiff's Distress," might be sold, and the proceeds thereof paid to him.

The summons was opposed by Messrs. *Galbraith, Grant & Co.*, creditors on the estate, whose claims against the estate had been allowed at £718 2*s*. 1*d*., and who had on the 12th of May, 1887, obtained an order giving them liberty to attend all proceedings in the action and to cross-examine the Plaintiff.

The grounds of opposition were:—

1. That the Plaintiff had no *bonâ fide* claim for rent, inasmuch as the lease of 1875 under which, admittedly, no rent was ever paid, and attending documents purporting to effect a sale of the business from father to son were a mere sham, and for purposes of exhibition only, so that the Plaintiff, who had in fact remained the actual though not the ostensible owner and manager of the business, had no right of distress.

2. That as a matter of law such right of distress, if valid, extended to one year's rent only.

In the event of the Plaintiff's claim being allowed it appeared that the estate would be insufficient for payment of the other creditors.

Romer, Q.C., and *D. L. Alexander*, in support of the Plaintiff's summons:—

We submit that there is nothing to displace the Plaintiff's claim as creditor upon the estate for rent under the lease of January, 1875.

It will be contended that the Plaintiff's claim, if valid, is limited by the *Bankruptcy Act*, 1883, sect. 42, to one year's rent only. That section, however, has no application, as there has been no "order of adjudication" within the terms of the section, and the contention is wholly negatived by the terms of sect. 125.

Whitehorne, Q.C., and *Bray*, for *Galbraith, Grant & Co., contrà*:—

The clear inference to be drawn from the evidence is, that as between the father and the son the business remained that of the father, who never really retired, but continued to be owner and manager, and by his course of conduct held himself out to the creditors as such.

Then as a matter of law, assuming the Plaintiff's claim as a creditor for rent to be valid, that claim is limited by the *Bankruptcy Act*, 1883, sect. 42, to one year's rent only accrued due prior to the date of the order of adjudication, which term by sub-sect. 2 "shall be deemed to include an order for the administration of the estate"—"of a deceased person who dies insolvent." In this case the estate is admittedly insolvent, and the fact that the order for administration has been made in the Chancery Division cannot affect our contention, as since the Act of 1883 (sect. 92), the jurisdiction in bankruptcy is exercised by the High Court, of which the Bankruptcy Court is now a Division and bound by the same rules.

[CHITTY, J. intimated his opinion that the words "order for the administration of the estate" used in sect. 42, sub-sect. 2, meant an order under the *Bankruptcy Act* according to the provisions of sect. 125.]

It unquestionably includes an order for the administration in bankruptcy under sect. 125 of the estate of a person dying insolvent, but is not limited to that, and means an order for administration in any branch of the High Court. Sect. 125 deals with and points to the new jurisdiction which has been conferred upon the Bankruptcy Division. In *In re Albion Steel and Wire Company* (1) it was expressly held, upon sect. 10 of the *Judicature Act*, 1875, that in the administration of an insolvent estate certain rules only of the law of bankruptcy, and not the whole of them, should prevail; and it was intended by the *Bankruptcy Act* of 1883 to get rid of that anomaly. Even if the proceedings be transferred to the Bankruptcy Court under sect. 125, sub-sect. 4, no fresh order of adjudication will have to be made, but the proceedings will be taken up as nearly as may be in the position in which they will leave this Court: *In re York* (2); thus shewing that the order for administration in this Division is equivalent to and included in the term "order of adjudication" used in sect. 42.

Romer, in reply, was stopped.

CHITTY, J. (after stating that upon the first point he came unhesitatingly to the conclusion that there was no ground for saying that the transaction between the father and son was a sham, so as to deprive the father of his *primâ facie* right to distrain under the lease of January, 1875, proceeded):—

Then a further point has been raised, which turns on the *Bankruptcy Act* of 1883. It is said that the estate of the deceased son is clearly insufficient for payment of his debts in full; in other words, therefore, that it is an insolvent estate, and accordingly that sect. 42 of the *Bankruptcy Act* of 1883 applies to this case and limits the right of the father to distress to one year; but to one year prior to what time? The language of the section is that the right to distress is to be available for one year's rent accrued prior to the date of the order for adjudication. There has been in this case no order of adjudication. Then sub-sect. 2 runs thus: "For the purposes of this section the term 'order of adjudication' shall be deemed to include an order for the administration of the estate of a debtor whose debts do not exceed fifty pounds, or of a deceased person who dies insolvent." The argument is that "order for the administration of the estate of a deceased person who dies insolvent" includes orders not simply

(1) 7 Ch. D. 547, 550.

(2) 36 Ch. D. 233, 239.

made by the Court of Bankruptcy under the jurisdiction conferred by this Act, but orders made by the High Court. Now it appears to me that this argument cannot be maintained. First this sub-section is merely explaining the meaning of the term "order for adjudication." "Order for adjudication" means obviously, and there is no question about this, an order made by what may be termed for shortness the Bankruptcy Court; that is, the Court which according to sect. 168 is defined to be "the Court having jurisdiction in bankruptcy under this Act." When the Legislature in that 2nd sub-section is explaining the term "order for adjudication" it would be a remarkable, but still a possible thing, that they should have used the term "order for administration" to denote the order of a Court of different jurisdiction. *Primâ facie* the order for administration must mean the order for administration in the same Court, but that is made plainer when the rest of the section is considered, and the answer to the argument does not depend on this observation only. The first thing that the order for adjudication is to include is an order for administration of the estate of a debtor whose debts do not exceed £50, that is of a living debtor; and what is referred to there is plainly an order under sect. 122 of this Act. Then the words order for the administration of the estate "of a deceased person who dies insolvent" by parity of reasoning would also, I think, include an order, and only extend to an order made under this Act. But I find the term "order for the administration of the estate of a deceased person who dies insolvent" used in several places in sect. 125 in such a way as to leave no doubt as to the meaning of the Legislature on this point. In sect. 125, sub-sect. 1 [to which his Lordship referred], occur the words "administration of the estate of the deceased debtor according to the law of bankruptcy." Then sub-sect. 2 provides that upon the prescribed notice being given to the legal personal representative of the deceased debtor the Court may "make an order for the administration in bankruptcy of the deceased debtor's estate." Under sub-sect. 3 such an order shall not be made "until the expiration of two months from the date of the grant of probate or letters of administration," unless as therein stated. Sub-sect. 4 also enacts that a petition for administration under the section (125) shall not be presented to the Court (*i.e.*, the Court having jurisdiction in bankruptcy), "after proceedings have been commenced in any Court of justice for the administration of the deceased debtor's estate," and then makes a provision for transfer. Then comes sub-sect. 5, which appears to me to be a very important sub-section bearing on this matter; in sub-sect. 6 the term "administration order" again occurs; and then sect. 9 may be referred to.

It appears to me, therefore, putting these various enactments together, to be reasonably clear that the Legislature intended that the term "order for administration" in sect. 42 should not extend to an order made by the Chancery Division. The limit of time for the distress is the date of the order for adjudication; and there is nothing in the order made for the administration of a dead man's estate in this Division to enable the Court at once to say that the estate has been adjudged to be insolvent and insufficient for payment of debts. If the argument of the Respondents prevailed, the result would be to introduce great confusion in the matter, for what time, according to this argument, is the Court to adopt as equivalent to the order for adjudication? It might be that administration had been going on for several years in this Court, and a creditor suddenly appeared with a large bond debt, up to that time altogether unknown, such as would altogether turn the scale (such cases have happened), and the estate would be shewn to be insolvent. Until that debt is brought in there is no adjudication which will shew the estate to be insolvent; there is nothing that enables the Court to fix a point of time which will be equivalent to the adjudication of bankruptcy. The result would be that sect. 42 plainly would not be applied during the earlier period of the administration, and would be brought into operation without there being anything in the shape of a fixed order, adjudicating in form or in substance on the question whether the estate is solvent or insolvent. When the order is made under sect. 125 by the Court having jurisdiction in bankruptcy, there the parties called before the Court, and before the order is made, can be heard on the question of solvency or insolvency, and the order, as is obvious from what I have already

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read from sect. 125, sub-sect. 2, cannot be made unless the Court is satisfied there is a reasonable probability that the estate will be insufficient. I think the result is that at the present time there is nothing equivalent to an order for adjudication, and there is nothing to which that term as used in sect. 42 applies. And it would be a strange anomaly if the Legislature had introduced by sect. 42 this one bankruptcy rule into administration in the Chancery Division, and not introduced various other rules which some people may think better than the rules applied in this Division; for instance, the priority of payment accorded in respect of wages and other matters of that kind. I ask, and I think there is only one obvious answer to the question, what is the effect if the Respondents should be right, of sub-sect. 5 of sect. 125, which divests the property out of the legal personal representative and vests it in the official receiver of the Court as trustee? Of course upon that part of the case there can be no question but that it means an order for administration in bankruptcy. The result is that the Respondents fail upon the second point also.

Solicitors: *Blake & Heseltine*; *Harper & Battcock.*

F. G. A. W.

In re NEW CHILE GOLD MINING COMPANY.

NORTH, J.

1888

March 24.

Company—Reduction of Capital—Confirmation by Court—" Capital lost or unrepresented by available assets"—Shares issued at a Discount—Sale of Property of Company in Voluntary Liquidation in Consideration of Shares in New Company—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 161 [*Revised Ed. Statutes, vol. xiv., p.* 237]—*Companies Act*, 1877 (40 *&* 41 *Vict. c.* 26), *ss.* 3, 4 [*Revised Ed. Statutes, vol. xviii., pp.* 367, 368].

The liquidator of a company in voluntary liquidation entered into an agreement, under sect. 161 of the *Companies Act*, 1862, for the sale of its property to a new company, part of the consideration being the issue to each shareholder of the old company of one share of £1 in the new company, with 15*s.* credited as paid up thereon, in exchange for each fully paid-up share of £1 in the old company held by such shareholder, and that the remaining 5*s.* per share should be payable by the allottee at the times mentioned in the agreement. The whole of the shares in the new company, 500,000 in number, were issued to the shareholders in the old company in the manner mentioned in the agreement. Prior to their issue a contract providing for their being issued in that way was filed with the Registrar of Joint Stock Companies, under sect. 25 of the *Companies Act*, 1867. The company afterwards increased its capital by the creation of 500,000 more shares of £1 each, of which 50,000 were issued as fully paid up as the consideration for the purchase of other property by the company, and 240,000 were issued at a discount of 15*s.* per share, a contract being in each case filed, prior to the issue, with the Registrar of Joint Stock Companies. After this had been done the company passed a special resolution for the reduction of the capital by cancelling paid-up capital to the extent of 15*s.* per share, as having been lost or being unrepresented by available assets. The company petitioned for the confirmation of the resolution by the Court. There was no evidence of any loss of capital otherwise than by reason of the issue of the shares at a discount:—

Held, that the issue of the shares at a discount was illegal, and that the shareholders were still liable to the extent of 15*s.* per share:—

Held, therefore, that the proposed reduction of capital could not be confirmed by the Court.

PETITION by the above company, asking for the confirmation by the Court of a special resolution for the reduction of the capital of the company.

The company was incorporated on the 20th of November, 1884, by registration under the *Companies Acts*, for the purpose of acquiring the property of a company called the *Chile Gold Mining Company, Limited*, which was then in voluntary liquidation under an extraordinary resolution passed on the 18th of November, 1884, and other mining property in *Venezuela*, and working the same. The capital of the new company was £500,000, divided into 500,000 shares of £1 each. Special resolutions were passed by the old company, under the provisions of sect. 161 of the *Companies Act*, 1862, authorizing the liquidator to transfer or sell all or any of the assets of the company to any other company formed or to be formed, and to receive in compensation or part compensation for such transfer or sale shares or other interests in any such other company. On the 3rd of December, 1884, a deed was executed between the old company and their liquidator of the one part, and the new company of the other part, by which the old company agreed as beneficial owners to sell and convey to the new company, and the new company agreed to purchase and accept, as from the 3rd of December, 1884, the undertaking, mines, and property of the old company, free from incumbrances, save and except the charges created by the indentures of mortgage executed to secure certain debentures which had been issued by the old company, and it was agreed that the new company should on or before the 1st of March, 1885, pay to the old company a sum sufficient to enable the liquidator to pay and discharge all the debts and liabilities thereof, including any liability to dissentient members under sect. 161 of the *Companies Act*, 1862, but not including the debentures, or should otherwise satisfy and discharge all such debts and liabilities, and should further pay and discharge all the costs, charges, and expenses of and incident to the winding-up of the old company; that the new company should take over, and indemnify the old company against all liability in respect of the debentures and the mortgage deeds, and that the new company should, if and when required to do so by the liquidator of the old company, allot and issue to each shareholder of the old company one share of £1 in the new company, with 15*s.* credited as paid up thereon, in exchange for each fully paid up share of £1 in the old company held by such shareholder, and that the remaining 5*s.* per share upon each of such shares in the new company should be payable by the allottee or transferee thereof, as to 1*s.* per share on the 6th of December, 1884, and as to the remaining 4*s.* per share as and when called up by the board of directors of the new company.

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The whole of the 500,000 shares in the new company were issued to shareholders in the old company as provided by the agreement, with 15*s.* per share credited as paid up thereon, and the remaining 5*s.* per share was afterwards paid up on all the shares. Prior to the issue of the shares a contract, dated the 3rd of December, 1884, between the old company and their liquidator of the one part, and the new company of the other part, providing for the issue of the shares with 15*s.* per share credited as paid up thereon in the manner above mentioned, was filed with the Registrar of Joint Stock Companies in accordance with the provisions of sect. 25 of the *Companies Act*, 1867.

In May, 1885, a special resolution was passed increasing the capital of the new company by a sum of £100,000 divided into 100,000 shares of £1 each. Of these shares 50,000 were issued as fully paid up in respect of the purchase by the company of certain mining property, under a contract dated the 28th of July, 1885, which before the issue of the shares was filed with the Registrar of Joint Stock Companies. These 50,000 fully paid-up shares were originally represented by share warrants to bearer. 17,500 of these warrants were afterwards redelivered to the company, and the remaining 32,500 were still outstanding. The remaining 50,000 shares of the 100,000 were issued as paid up to the extent of 19*s.* per share, in pursuance of two contracts dated the 11th of November and the 13th of December, 1886, in consideration of a sum of £12,500, being 4*s.* per share, paid by the allottees to the company in respect of those shares. The two contracts were prior to the issue of the shares filed with the Registrar of Joint Stock Companies. The remaining 1*s.* per share was afterwards paid up on those 50,000 shares.

In May, 1887, a special resolution was passed for increasing the capital by £400,000 in 400,000 shares of £1 each. Of these shares 190,000 were issued at a discount of 15*s.* per share, in pursuance of contracts filed with the Registrar of Joint Stock Companies prior to the issue of the shares. The remaining 5*s.* per share had been paid up on these shares. The remaining 210,000 of these shares had not been issued. By the articles of association the company was authorized at any time to reduce its capital in the manner prescribed by the *Companies Acts*, 1867 and 1877.

In March, 1888, the company passed a special resolution, "that the capital of the company be reduced by £750,000, by cancelling paid-up capital which has been lost or is unrepresented by available assets to the extent of 15*s.* per share upon each of the 1,000,000 shares which have been issued or authorized to be issued."

The petition stated that previously to the passing of the special resolution paid-up capital to the extent of £592,500 had been lost or was unrepresented by available assets, and that the proposed reduction of capital did not involve either the diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital.

The only evidence of the loss of capital was an affidavit made by the chairman of the company, repeating the statements contained in the petition.

There was no Respondent to the petition.

Cookson-Crackanthorpe, Q.C., and *A. Young*, for the company, referred to *In re Plaskynaston Tube Company* (1); *In re Ince Hall Rolling Mills Company* (2); *In re Addlestone Linoleum Company* (3).

NORTH, J.:—

I cannot make any order on the petition, and I must dismiss it. It is based on this, that the shares were issued to the shareholders with 15*s.* per share paid up thereon, and 5*s.* per share which remained to be paid. The real transaction was this, that the shares were to have 5*s.* per share paid in cash and 15*s.* per share additional was to be credited as paid up, not because it was in fact paid or because it represented actual value, but merely as representing nothing. The case is not put on the ground that, at the time when the shares were issued, this 15*s.* per share represented assets which have been lost since; but it is admitted that there was nothing then in existence to represent it. It seems to me that there is a dilemma out of which there is no way of escape. Either the transaction was that which it is stated to be in the petition; or the new company bought the property of the old

(1) 23 Ch. D. 542.

(2) 23 Ch. D. 545, n.

(3) 37 Ch. D. 191.

company on the terms of discharging all the liabilities of the old company and the costs of the winding-up, and agreeing to give to all the shareholders in the old company in lieu of their shares in the old company a similar number of shares in the new company credited with 15*s.* per share paid up. If all the old shareholders had taken shares in the new company there would have been 15*s.* all round. But it was contemplated that there might be some shareholders in the old company who would not, or could not, take shares in the new company, and those persons would be entitled to receive compensation, under the provisions of s. 161 of the Companies Act, 1862, for their interests in the old company, and the agreement provided amongst other things for the taking over by the new company of all liability to dissentient members of the old company. The transaction really contemplated was that the shareholders who should take shares in the new company would receive value to the amount of 15*s.* per share, and would incur a liability of 5*s.* per share only: and if that is the true basis, there is nothing to shew that the value which they got has ceased to be available assets of the new company. But the petition is addressed to the case, that in point of fact that 15*s.* per share represented nothing; or, in other words, that the 1*l.* shares were issued at a discount of 15*s.* per share. In my opinion such a transaction is not legal, and has not the effect of relieving the shareholders from liability to pay up 15*s.* per share beyond the 5*s.* per share. *In re Addlestone Linoleum Company* (1) applies exactly to the present case. Having regard to the way in which the matter is brought before me, I can only say that no case has been shewn which can justify me in confirming the proposed reduction of capital.

Solicitors: *Kearsey, Hawes, & Walsh.*

W. L. C.

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(1) 37 Ch. D. 191.

NORTH, J.

1888

April 25.

HUGILL *v.* WILKINSON.

[1887 H. No. 958]

Equitable Mortgage—Reversion—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2 [*Revised Ed. Statutes, vol. xvii., p.* 251].

Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession.

JOSEPH HUGILL, of *Whitby,* deceased, by his will, dated 1838, devised certain houses at *Whitby,* and all other his real estate, after the death of his wife, *Dinah Hugill,* to trustees upon trust to pay and equally divide the rents in manner therein mentioned during the life of the longest liver of seven of his children, and after the decease of the survivor in trust for all and every his grandchildren the children of his said sons and daughters, and of his daughter, *Elizabeth Battersby,* deceased, as should then be living equally to be divided amongst them as tenants in common.

The testator died in February, 1848; his wife died in 1858; and the last survivor of his seven children named in the will died on the 10th of August, 1886. This was an action for partition of the testator's real estate. Judgment had been given in common form directing an inquiry as to the persons interested, and as to incumbrances.

Two of the testator's grandsons, who survived all his children, were *Joseph Wilkinson* and *John* his brother. In September, 1870, *John Wilkinson* lent his brother *Joseph* £150, and the latter signed a document, dated the 22nd of September, 1870, in the following terms:—

"Received the sum of one hundred and fifty pounds from my brother *John Wilkinson* on the twenty-second day of September, one thousand eight hundred and seventy, and I hereby give him as security the whole of my interest I am entitled to out of the property left by my grandfather *Joseph Hugill.*"

Joseph Wilkinson was adjudicated bankrupt in February, 1871.

He had been discharged, and his interest in the testator's real estate was, subject to the equitable charge in favour of *John Wilkinson*, vested in the official receiver. *John Wilkinson* carried in a claim to rank as an incumbrancer on the share of *Joseph Wilkinson* for £150. The claim was contested on the part of the official receiver, on the ground that the right of action was barred by statute, and adjourned into Court. It was admitted that the right to sue on the debt was barred by statute.

Birrell, for *John Wilkinson*:—

The appropriate remedy for an equitable mortgagee of a reversionary interest in land is an action for foreclosure. Such an action is an action for recovery of land, and is not within sect. 40 of the *Statute of Limitations* (3 & 4 Will. 4, c. 27), but is within sects. 2 and 24 of that Act, and by parity of reason it is now affected by sect. 2 of the *Real Property Limitation Act*, 1874. The remedy is, therefore, not barred till the lapse of twelve years from the time the mortgagor's interest falls into possession: *Harlock* v. *Ashberry* (1).

Ingle Joyce, for the Official Receiver:—

The mortgagee of a reversionary interest in land is entitled to foreclose immediately without waiting till the mortgaged estate falls into the possession of the mortgagor: *Sinclair* v. *Jackson* (2). If he forecloses he will get the land as and when the mortgagor would have got it, and time for that purpose does not begin to run against him till the period at which he is first entitled to bring an action to recover the land in possession: *Pugh* v. *Heath* (3). But the time within which he can bring an action against his mortgagor for foreclosure runs from the last payment or other acknowledgment by the mortgagor.

NORTH, J.:—

In my opinion there is a charge here. The security is one which was made on the 22nd of September, 1870, signed by *Joseph Wilkinson*, by which, to put it shortly, he charges in favour of *John Wilkinson* all his interest in the property left by his grandfather. The property left by his grandfather included certain real property, which was devised by a will made as far back as the year 1838 to *Dinah Hugill* for life, and after her death to trustees upon trust to pay and equally divide the rents unto certain persons until the death of the longest liver of them, which took place on the 10th of August, 1886, and then from and after the death of the longest liver, in trust for certain persons not named, but who are described in the will as being his grandchildren, children of certain persons named; and of those persons *Joseph Wilkinson* is one, and *John Wilkinson* is another.

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(1) 19 Ch. D. 539.

(2) 17 Beav. 405.

(3) 7 App. Cas. 235.

Now the charge given by *Joseph Wilkinson* in 1870 was reversionary, that is to say, though it was a present charge, it was a charge on property into possession of which he could not come in any way until the death of a person, which happened, in fact, in 1886. But *John Wilkinson* was not bound to wait until the reversion fell into possession to enforce his charge; he might have taken steps to enforce it at any time after the charge was created. I gather there has been nothing done by way of part acknowledgment, or part payment, or anything of that sort which would keep the charge alive, and, therefore, I take it that the personal claim by *John Wilkinson* against *Joseph Wilkinson* for the debt has been barred by the statute.

But the question is whether he is or is not entitled to come and ask to have this charge upon *Joseph Wilkinson's* share recognised by the Court. To put the matter in a simple way; supposing *Joseph Wilkinson* had taken the whole property instead of a share, and had not been made bankrupt, *John Wilkinson* would have had a charge upon it, which he would have been entitled by proceedings against *Joseph Wilkinson* to enforce by way of foreclosure; and, if the legal estate had been outstanding in the trustee of *Joseph Wilkinson*, he could have joined the trustee as Defendant in the action for the purpose of obtaining from him the conveyance of the legal estate which he would have obtained from *Joseph Wilkinson*, if the legal estate had been in him; and it would have been proper to have joined the trustee for that purpose. At the present moment the right of *Joseph Wilkinson* or the official receiver to proceed against the trustee of the will is clear, because his right to call for a conveyance can only be within the statute from the period when the reversion fell into possession. I see no reason why a mortgagee's right should not be as large as the mortgagor's.

At the present moment it is clear that *Joseph*, or the official receiver, could take proceedings against the trustees of the will to have the share made over to him; the only defence suggested is that of the statute. But the right of *Joseph*, or the trustee, to bring such action is clearly unaffected by the statute of the 3 & 4 Will. 4, or the later statute (which alters the time, but re-enacts and confers substantially the same rights in other respects) of 1874.

Now the right of *John Wilkinson* against *Joseph Wilkinson* and the persons claiming under him, is a right to enforce a charge. That charge may be enforced by way of foreclosure. An action for foreclosure, or the right to bring an action for foreclosure, seems to me to be the same thing, for this purpose. It is clearly within *Harlock* v. *Ashberry* (1), an action or right to bring an action for the recovery of land, and it is expressly held to be within sect. 2 of the Act of 3 & 4 Will. 4, and it follows it is equally within sect. 1 of the Act of 1874. The first section of that Act provides "after the commencement of this Act, no person shall . . . bring an action" (I omit all the words except those that are material) "to recover any land, . . . but within twelve years next after the time at which the right . . . to bring such action shall have first accrued to some person through whom he claims." Now, it is clear that the right to bring an action within the meaning of this Act is to be deemed to have first accrued at the period defined by the 2nd section; that is to say, the right to bring the action shall be deemed to have first accrued in respect of an estate or interest in reversion or remainder at the time at which the same shall have become an estate or interest in possession. That section does not prevent a mortgagee of a reversionary interest taking proceedings against his mortgagor while it is still an interest in reversion. It does not touch that case at all. But it does deal with the case when it is an interest in possession, by enacting that the right to bring an action shall

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(1) 19 Ch. D. 539.

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only be barred by lapse of twelve years after the interest has become an interest in possession. Unless it is barred in that way, it is not barred at all. The right to bring an action for the recovery of the land continues until the expiration of twelve years from the time at which there has been a right to bring an action to recover the land in possession.

Under these circumstances, the right of *John Wilkinson* to bring an action for the recovery of the land against *Joseph Wilkinson* is expressly saved by the 2nd section of the Act of 1874. That being so, he would have a right to bring it against *Joseph Wilkinson*, and also against the trustees in whom the legal estate was vested: and now when there is an inquiry as to who are the persons interested in the land, the right of *John Wilkinson* to bring an action to recover it against *Joseph Wilkinson*, or those claiming under him, and the trustees in whom it is vested, is one which must be recognised as an existing interest.

Solicitors for *John Wilkinson*: *Radford & Frankland*, agents for *Woodwark & White, Whitby*.

Solicitor to the Board of Trade for the *Official Receiver*.

D. P.

ROOTS *v.* WILLIAMSON.

STIRLING, J.

1888

March 7, 8, 15.

[1886. R. 885]

Company—Transfer of Shares—Non-registration of Transfer—Inchoate Legal Title—Pre-existing Equitable Title.

The deed of settlement under which a company was formed provided (*a*) that no person claiming to be the proprietor of any share by transfer should be treated as such unless and until he should have been registered in the register of shareholders as the proprietor of such share; (*b*) that no person should be entitled to be registered as the proprietor of any share unless and until by execution of the deed of settlement, or some deed referring thereto, he should have undertaken all the obligations of a shareholder; and (*c*) that every transfer should be effected by deed which, when executed, should be deposited or left at the office of the company.

The Plaintiff, a married woman, living apart from her husband, purchased shares in the company with moneys forming part of her separate estate, and such shares were transferred to and registered in the name of *W.*, who held them as trustee for her for her separate use.

W., being indebted to the Defendants, as a security for his debt, deposited with them the certificates, and executed to them a transfer of the shares. The deed of transfer did not refer to the deed of settlement, and the Defendants sent it (along with the certificates) to the office of the company, for registration; but did not execute or offer to execute the deed of settlement. The company having received notice that the Plaintiff claimed the beneficial ownership of the shares, did not proceed to register the transfer.

In an action by the Plaintiff to establish her title to the shares:—

Held, that the Defendants had neither a complete legal title to the shares, nor as between themselves and the company an unconditional right to be registered as shareholders in the place of *W.*, and that their title being inchoate only was insufficient to defeat the pre-existing equitable title of the Plaintiff.

Dodds v. *Hills* (1) observed upon and distinguished.

In the year 1876 the Plaintiff, a married woman, living apart from her husband, purchased with moneys forming part of her separate estate, 175 shares of £10 each (with £2 paid up) in the *Whittington Life Assurance Company*; a company originally formed under the Act 7 & 8 Vict. c. 110, but now registered under the *Companies Act*, 1862. These shares were transferred to and registered in the name of *Alfred Mortimer Waller*, and he held them as trustee of the Plaintiff for her separate use. In

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(1) 2 H. & M. 424.

March, 1880, *Waller*, at the request of the Plaintiff, transferred the shares to the Defendant *George Thomas Williamson*, who also held them as trustee of the Plaintiff for her separate use. On the 12th of April, 1881, the Plaintiff, at the request of *Williamson*, wrote and signed the following memorandum:—

"I hereby authorize Mr. *G. T. Williamson* of *East Dulwich* to dispose of the whole or a part of the 175 shares he holds on my behalf in the *Whittington Life Assurance Company*."

On the 9th of August, 1883, *Williamson*, at the request of the Plaintiff, gave to her an I. O. U. for £496, the amount of the original price of the shares.

It appeared that *Williamson* was a member of the firm of *Williamson & Nelson*, who carried on business at *Wood Street* in the city of *London*, and had dealings with the Defendants *Hodgkinson & Arnold*, in respect of which the former had towards the end of 1886 become indebted to the Defendants in the sum of £200 or thereabouts. For this sum the Defendants required security, and, early in February, 1886, *Williamson* deposited with the Defendants the certificates of seventy-five of the Plaintiff's shares in the *Whittington Life Assurance Company*, and executed a transfer of these shares to them, which transfer was substantially according to the form given in Table A to the *Companies Act*, 1862, but at the time of its execution was undated, and without expressed consideration, being on a printed form with the spaces for date and consideration left blank.

On the 26th of April the Plaintiff wrote to the manager of the company a letter, stating to the effect that *Williamson* held the shares in trust for her, and asking whether the shares could be transferred either to herself or her daughter. To this the manager replied on the 29th of April to the effect that the shares must be transferred by *Williamson*, and could not be transferred to the Plaintiff, but might be transferred to her daughter.

About the 4th or 5th of May the Defendants *Hodgkinson & Arnold* executed the transfer from *Williamson* to themselves, filling up the blank left for the consideration with "5*s*.," and that left for the date with "4 of May;" and on the 6th of May Messrs. *Fernyhough & Ashe*, their brokers, sent the transfer (along with the certificates) to the company for registration. On receipt thereof the manager wrote to the Plaintiff on the 7th of May and informed her that he had received for registration a transfer to *Hodgkinson & Arnold* of the seventy-five shares claimed by her, and at the same time he wrote to *Fernyhough & Ashe* stating that the Plaintiff claimed the shares comprised in the transfer forwarded as actually hers though nominally held by *Williamson*, that he had communicated this fact to *Williamson* on the previous Monday verbally and since by letter, and that he should await the Plaintiff's reply to or action upon his notification to her of the proposed transfer before submitting it to his board for approval.

Thereupon the Plaintiff took steps to assert her rights to the shares, and on the 10th of May the writ in this action was issued against *Williamson* alone, and on the 13th of May an injunction was obtained against him. The company were subsequently made parties; but on the 25th of May proceedings were stayed against them upon their undertaking not to register the transfer, and to deal with the shares and certificates as the Court should direct. *Hodgkinson & Arnold* were afterwards added as parties, and on the 27th of May an interim order was obtained restraining them from dealing with the seventy-five shares, and from completing or allowing to be completed any transfer of or dealings with the said shares or any portions thereof, except to the Plaintiff.

The material provisions of the deed of settlement of the company were to the following effect:—

Art. 4: That "every person who should from time to time appear registered as the proprietor of any share in the register of shareholders" should, "unless and until his share shall by operation of law or otherwise conformably to the provisions herein contained become vested in some other person," be treated by the company as the lawful proprietor of such share.

Art. 5: That no person claiming to be the proprietor of any share "shall be entitled to be treated or recognised as such unless and until he shall have been registered in the register of shareholders aforesaid as the proprietor of such share."

Art. 6: That no person (with certain immaterial exceptions) "shall be entitled to be registered in the register of shareholders

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as the proprietor of any share unless and until he shall by his execution of these presents or some deed referring thereto have undertaken all the liabilities, duties, and obligations of a shareholder in respect of such share."

Art. 13: "That the company shall in no case be bound to notice any trust . . . or equitable right or interest affecting any share distinct from the legal title thereto."

Art. 14: That . . . "every transfer of shares shall be effected by deed which when executed shall be deposited or left at the office, and remain in the custody of the company: and such deed shall be according to the form A contained in schedule hereto or to the like effect."

The form of transfer given in the schedule to the deed of settlement was substantially the same as that given in Table A in the first schedule of the *Companies Act*, 1862, except as to its final clause, which was as follows: "And I the said" (transferee), "do hereby agree to take the said shares subject to the same conditions, and to the provisions of the deed or deeds of settlement of the said company:" and the transfer executed by *Williamson* to the Defendants did not contain this clause nor any reference to the deed of settlement, nor had the Defendants ever executed or offered to execute that deed.

The action now came on for trial as against the Defendants *Hodgkinson & Arnold*, and upon motion for judgment on default in delivering a defence as against the Defendant *Williamson*.

Buckley, Q.C., and *Mulligan*, for the Plaintiff:—

The Plaintiff has a pre-existing equitable title, and in order to displace it the Defendants must shew either that they have acquired a legal title to these shares, or that they have an equity which though posterior in time is preferable to that of the Plaintiff: *Société Générale de Paris* v. *Walker* (1). The Defendants have no such equity, and they have not and never had either a complete legal title or an absolute and unconditional right to be registered as the holders of the shares. Under the articles of association the Defendants could only acquire a complete legal title through a deed of transfer; and the document which was sent to the office for registration on the 6th of May, 1886, even if it ever was a deed was not a deed at the time of execution. It had, after execution, been "altered in a point material," *i.e.*, by the addition of the date and consideration, and had therefore become void within the second rule in *Pigot's Case* (1); *Knill* v. *Williams* (2); *Master* v. *Miller* (3); *Suffell* v. *Bank of England* (4); *Shropshire Union Railways and Canal Company* v. *Reg.* (5); *Easton* v. *London Joint Stock Bank* (6); *Hibblewhite* v. *M'Morine* (7); and 7 & 8 Vict. c. 110, s. 54.

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(1) 11 App. Cas. 20.

[STIRLING, J., referred to *Davidson* v. *Cooper* (8).]

Again, the 14th clause of the deed of settlement provides that the deed of transfer shall be according to the form A contained in the schedule thereto, and even if this instrument was a deed at the time it was sent or deposited, it was not a deed according to that form, for it contained no agreement to take the shares subject to the provisions of the deed of settlement.

Hastings, Q.C., and *G. Broke Freeman*, for the Defendants *Hodgkinson & Arnold*:—

By the memorandum of the 12th of April, 1881, the Plaintiff gave to *Williamson* authority to "dispose of" the shares, *i.e.*, to sell them and to give a receipt for the purchase-money, and on the 9th of August, 1883, she took from him an I. O. U. for the amount she originally paid for the shares; so that even if the title of the Defendants is merely equitable, they have a better equity than that of the Plaintiff. They have, however, "a supervening legal title obtained by transfer" according to the expression used by Lord *Cairns* in the *Shropshire Union Railways and Canal Company* v. *Reg.* (9), for the legal interest passed by the deed of transfer, although the shape in which it was brought to the office may not have been in literal accordance with the company's forms: *Dodds* v. *Hills* (10).

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(1) 11 Rep. 26 b.

(2) 10 East, 431.

(3) 4 T. R. 320; 1 Sm. L. C. 8th Ed. 857.

(4) 9 Q. B. D. 555.

(5) Law Rep. 7 H. L. 496.

(6) 34 Ch. D. 95.

(7) 6 M. & W. 200.

(8) 11 M. & W. 778, 795–800.

(9) Law Rep. 7 H. L. 506.

(10) 2 H. & M. 424.

[STIRLING, J., referred to *Nanney* v. *Morgan* (1).]

In *Nanney* v. *Morgan* the question turned upon the 14th, 15th, and 16th sections of the *Companies Clauses Act* (8 Vict. c. 16), under which the deed of transfer did not have the effect of putting the transferee in the position of the transferor until it had been delivered to the secretary: and the Court expressed no opinion that registration was necessary as well as delivery in order to pass the legal interest. And the case of *Société Générale de Paris* v. *Walker* (2) was decided on a clause which provided that shares in the company were to be transferable only by deed executed by the transferor and transferee, "and duly entered in the register of transfers." But there is no such provision in the deed of settlement of this company. If, however, the legal title to those shares is not complete as between the Defendants and the company, they have forwarded the deed of transfer duly executed to the office, and have acquired the right to have their transfer registered, which comes to the same thing, and their title cannot be impeached: *Lindley* on Partnership (3); *Briggs* v. *Massey* (4). The addition of the nominal consideration and the filling in of the date were not alterations "in a point material" sufficient to vitiate the deed: and with reference to the form of the deed, it was in substantial compliance with clause 14, which merely directs that the deed of transfer shall be "according to" the form in the schedule "or to the like effect."

Buckley, in reply:—

The company cannot recognise anybody except the registered shareholder as the proprietor of any share.

Dodds v. *Hills* (5) is distinguishable, for the company there had no notice of the breach of trust, and the transfer was completed by registration. Moreover, that case is inconsistent with the later decisions: *France* v. *Clark* (6); *Société Générale de Paris* v. *Walker*, and *Nanney* v. *Morgan*.

[The cases of *Prince* v. *Prince* (7); *Tayler* v. *Great Indian*

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(1) 37 Ch. D. 346.

(2) 11 App. Cas. 20.

(3) 4th Ed. p. 663.

(4) 42 L. T. (N.S.) 49.

(5) 2 H. & M. 424.

(6) 22 Ch. D. 830; 26 Ch. D. 257.

(7) Law Rep. 1 Eq. 490.

Peninsula Railway Company (1), *Ex parte Sargent* (2), and the *Colonial Bank* v. *Whinney* (3) were also referred to during the course of the arguments.]

1888. Mar. 15. STIRLING, J. (after stating the facts of the case and observing in the course of such statement that upon the evidence he was of opinion that the beneficial ownership of the shares was not intended to be affected by the memorandum of the 12th of April, 1881, or the I. O. U. of the 9th of August, 1883; that the beneficial ownership of the shares remained in the Plaintiff; that the memorandum was meant to be an authority to dispose of the shares on behalf of the Plaintiff; and that the I. O. U. was taken by her as a security for any misuse by *Williamson* of the powers she had conferred upon him continued):—

Under the circumstances which I have stated the Plaintiff had unquestionably, in the first instance, a clear equitable title to the shares registered in the name of *Williamson*. That title was, however, liable to be defeated by a legal title obtained through transfer: and it might also be defeated by such conduct or representations on the part of the Plaintiff, as (to use the words of Lord *Cairns* in the *Shropshire Union Railways and Canal Company* v. *Reg.* (4)) "would operate and enure to forfeit and to take away the pre-existing equitable title."

It has been contended for the Defendants *Hodgkinson & Arnold* that the documents of the 12th of April, 1881, and August, 1883, have the effect of creating in their favour, and as against the Plaintiff, such a prior and countervailing equity. I am unable, however, to see how this can be. These Defendants did not deal with *Williamson* on the faith of these documents; and even if they had so done, I do not think they were entitled by virtue of them to take the shares as a security for the antecedent debt of *Williamson*. There is a wide difference between taking the shares as security for an advance and taking them as security for an antecedent debt. In the former case *Williamson* might be presumed to be acting on behalf of the Plaintiff and within the scope of his authority; in the latter he must, *primâ*

(1) 4 De G. & J. 559.
(2) Law Rep. 17 Eq. 273.
(3) 11 App. Cas. 426.
(4) Law Rep. 7 H. L. 506.

facie at least, be taken to act on his own behalf, and contrary to the authority conferred on him by the Plaintiff.

The real question is whether *Hodgkinson & Arnold* have by the transfer acquired such a legal title as to defeat the pre-existing equitable title of the Plaintiff.

It was contended in the first place, on behalf of the Plaintiff, that the transfer was materially altered after the execution of it by *Williamson*, and so became void, and ceased to be a deed within the meaning of the clauses of the deed of settlement relating to transfer. I think it unnecessary to express an opinion on this point, and assume (without deciding) that the transfer was a valid and effectual deed when it was sent to the company on the 6th of May, 1886.

It was further contended on behalf of the Plaintiff that the Defendants *Hodgkinson & Arnold* had not, at the time when notice of the Plaintiff's claim was given to the company, and have not since had, and have not now, a complete legal title to her shares; and both in support of and in opposition to this contention the case of *Société Générale de Paris* v. *Walker* (1) was much relied on.

In that case the articles of association of the company provided (art. 26) that shares should be "transferable only by deed executed by the transferor and transferee, and duly entered in the register of transfers;" and (art. 32) that a person should not be registered as the transferee of a share "until the instrument of transfer duly executed" had been left with the secretary to be kept with the records of the company.

In advising the House of Lords, Earl *Selborne* says (2): "The Courts below both thought (and I agree with them) that there was not, as against the respondents, any sufficient evidence of a delivery of the completed transfer by *James Montgomery Walker*. But even if there had been such evidence, I should not myself have considered a merely inchoate title by an unregistered transfer equivalent for the present purpose to a legal estate in the shares. Such a transfer might, indeed, give a legal right of action against the company if they, without just cause, refused to register it; it might also be a good foundation for an application to a competent Court to rectify the register. But it could not, under the 26th article of association of the Tramways Company, confer (while unregistered) a legal title to the shares themselves: nor do I think that the fact of its execution and of a claim having been made to register it before the company had notice of the prior equitable title, would necessarily make it the duty of the company, after receiving such notice, to register it, or of a Court to compel them to do so, and thereby to effectuate a fraud, till then incomplete. If, indeed, all necessary conditions had been fulfilled to give the transferee, as between himself and the company, a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title, the case might be different."

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(1) 11 App. Cas. 20.

(2) 11 App. Cas. 28.

He concludes by saying on p. 30: "The appellants therefore have not shewn either a legal title to these shares, or (as between themselves and the company) an absolute and unconditional right to be registered as shareholders in place of *James Montgomery Walker*."

In reading these passages the provisions of the articles of association of the company are doubtless to be borne in mind. So reading I think it may be inferred that the following propositions are sanctioned by his Lordship's authority:—

(1.) A merely inchoate title by an unregistered transfer is not equivalent for the purpose of defeating a pre-existing equitable title to a legal estate in the shares.

(2.) The title by transfer is to be deemed inchoate only (within the meaning of the last proposition) until (at the earliest) all necessary conditions have been fulfilled to give the transferee, as between himself and the company, a present, absolute, and unconditional right to have the transfer registered.

(3.) A company which, before a transfer has ceased to confer an inchoate title, only receives notice of a prior equitable title, is not necessarily bound to act upon such transfer, so as to effectuate a fraud till then incomplete.

Lord *Blackburn's* speech in the same case is also of importance. [His Lordship then read from the report the passage commencing on p. 40 with the words, "*Lindley*, L.J.:—In the present case,"

. . . and ending on p. 41 with the words, "After the receipt of that notice nothing which they did could have affected the prior right of the respondents."]

It would seem, therefore, to be his Lordship's opinion that a company receiving a transfer for registration is not bound to act on it at once, even though "in order," but is entitled to a reasonable time to make reasonable inquiries; and that if before the expiration of such reasonable time notice is given to it of the existence of a prior equitable title, the company is not necessarily bound to proceed further. The inference seems to be that, until the company has in some way shewn its acceptance of the transfer, the legal title is incomplete. Lord *Watson* concurs.

Lord *Fitzgerald* does not consider it necessary to decide the point.

The Lord Chancellor (Lord *Halsbury*) concurs with Lord *Blackburn*.

The case of *Nanney* v. *Morgan* recently decided in the Court of Appeal (1) has an important bearing on the question, at what point the legal title to shares becomes complete. That case was decided with reference to shares in a company governed by the *Companies Clauses Act*, 1845; but the *ratio decidendi* throws light on the question in the present case.

The leading judgment was delivered by Lord Justice *Cotton*, who says (2): "If the effect of a transfer of shares is to give to the transferee the rights against the company which the transferor had, the deed alone clearly does not transfer them effectually, for sect. 15 says, 'The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called 'the register of transfers,' and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser.' So something more than the execution of the deed is required, and then at the end of the section we find these words: 'And until such transfer has been so delivered to the secretary as aforesaid, the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share.' That as regards the company provides that the deed shall not have any effect, so as to put the transferee into the position of the transferor, until it has been left with the secretary, and it must be not only left, but accepted by him as properly left, because if the secretary finds that it does not comply with the provisions of the Act it is his duty to refuse to receive it. In my opinion here the deed of transfer had no effect until it was duly stamped and was received by the secretary so as to make the transfer effectual as between the company and the transferee. Therefore as between the company and everyone else it is clear that under the Act what may be called the legal right to this stock at the time of the execution of the voluntary settlement still remained in the transferors as trustees of the marriage settlement."

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(1) 37 Ch. D. 346.

(2) 37 Ch. D. 353.

The reasoning on which this judgment is based seems to shew that the transfer is not complete until everything has been done which is necessary to put the transferee into the position of the transferor, or possibly a narrower view may be that, where the transfer has to be left with the company, still it does not take effect until the officers of the company have examined it, and accepted it as properly left. This would seem to agree with what is laid down by Lord *Blackburn* in the speech to which I have referred.

Sir *J. Hannen* concurs, without adding any observations.

Lord Justice *Lopes* says (1): "I am entirely of the same opinion . . . the transferor, until the delivery of the deed of transfer to the secretary, is subject to all the liabilities and entitled to all the rights which belong to a shareholder or stockholder, and, in my opinion, until the requisite formalities are complied with, he continues the legal proprietor of the stock or shares subject to that proprietorship being divested, which it may be at any moment, by a compliance with the requisite formalities."

I have now to apply the light derived from these, the most recent and important authorities, to the present case, and consider whether the Defendants *Hodgkinson & Arnold* have shewn a legal title in themselves, or (as between themselves and the company) an absolute and unconditional right to be registered as shareholders in the place of *Williamson*, and for this purpose I must again refer to the principal clauses of the deed of settlement. The form A given in the schedule to the deed of settlement as the form in which according to clause 14 every transfer of shares is to be effected differs from that which was executed in this case, and concludes: "And I the said (transferee) do hereby agree to take the said shares subject to the same conditions, and to the provisions of the deed or deeds of settlement of the said company." And I am of opinion that under clause 14 it was essential to the legal validity of a transfer that the deed by which it was effected should be "deposited or left at the office of the company."

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(1) 37 Ch. D. 355.

Further, clause 5 provides that no person claiming to be the proprietor of any share by (amongst other titles) transfer shall be entitled to be treated or recognised as such, unless and until he shall have been registered in the register of shareholders as the proprietor of the shares. And clause 6 provides that no person (with certain exceptions unnecessary to be regarded) is to be entitled to be registered in the register of shareholders as the proprietor of any share, unless and until he shall by the execution of the deed of settlement or some deed referring thereto have undertaken all the liabilities, duties and obligations of a shareholder in respect of such shares.

First of all then, have the transferees acquired the legal title to the shares which the transferor had? The answer must be in the negative; for clause 5 makes registration in the register of shareholders essential to the completion of the title, and brings the case almost within the very terms of *Société Générale de Paris* v. *Walker* (1).

The same conclusion may be arrived at in another way. As I have said, clause 14 renders it, in my opinion, essential that the transfer should be left at the office of the company. But regard being also had to clauses 5 and 6, I think it is not enough that it should be so left. The officers of the company charged with the duty of receiving the transfer must examine it and ascertain whether it complies with the requirements of the deed of settlement, and if it does not it is their duty to reject it: and I think

(1) 11 App. Cas. 20.

it follows both from what is laid down by Lord *Blackburn* in the case of *Société Générale de Paris* v. *Walker* (1), and by the Court of Appeal in the case of *Nanney* v. *Morgan* (2), that it is not until this has been done, and the transfer has been accepted by the company as a proper transfer, that it becomes effectual as between the company and the transferee.

Now there is no controversy that matters remain as they stood on the 7th of May, 1886, and that the transfer has not been accepted by the company as a proper transfer; and, as is laid down by Earl *Selborne* in *Société Générale de Paris* v. *Walker*, the company are not bound to accept it so as to effectuate a fraud which is still incomplete.

Lastly, let us apply the alternative test used by Lord *Selborne* in *Société Générale de Paris* v. *Walker*, viz., whether on the 7th of May, 1886, the Defendants *Hodgkinson & Arnold* had acquired "an absolute and unconditional right to be registered as shareholders." The transfer executed by *Williamson* does not refer in any way to the deed of settlement. No offer has ever been made by *Hodgkinson & Arnold* to execute the deed of settlement, nor have they executed that deed. Accordingly by virtue of clause 6, they are not entitled to be registered on the register of shareholders as the proprietors of these shares; and by virtue of clause 5 they are not entitled as between themselves and the company to be treated or recognised as the proprietors of the shares. Their title therefore is inchoate only, and it is accordingly insufficient to defeat that of the Plaintiff.

I ought perhaps to refer to the case of *Dodds* v. *Hills* (3), upon which much reliance was placed by the Defendants during the course of the argument. In that case a sole trustee of shares executed a transfer of the shares and delivered it with the certificates to a mortgagee who had no notice of the trust, but who afterwards received notice of the trust and then got the transfer registered by the company. The mortgagee's title prevailed over that of the *cestuis que trust*; and the case may therefore be cited as an authority for the proposition that where a purchaser for value without notice of an equitable title acquires an inchoate title, but after notice, completes it by getting in the legal estate, he will not, as an ordinary rule, be deprived, in favour of a person having only an equitable title, of the advantage he has thereby obtained. But in the present case the company had notice of the breach of trust before the transfer was sent to them for registration (which does not appear to have been the case in *Dodds* v. *Hills* (1), and the legal title has never been completed by registration as it was in *Dodds* v. *Hills*. This distinguishes the present case from *Dodds* v. *Hills*, and it is therefore unnecessary for me to consider whether all the propositions laid down by the Vice-Chancellor in that case are entirely consistent with the more recent decisions.

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(1) 11 App. Cas. 20.
(2) 37 Ch. D. 346.
(3) 2 H. & M. 424.

On all these grounds I accordingly hold that the title of the Plaintiff to these shares must prevail, and that there must be judgment against *Williamson* with costs.

Solicitors: *Worrell; Rexworthy.*

W. W. K.

(1) 2 H. & M. 424.

DAVIES *v.* DAVIES.

[1885 D. 1938.]

KEKEWICH, J.

1888

Feb. 10.

Lease by Tenant for Life—Settled Estates Act, 1877*—Impeachment for Waste—Tenant for Years—Permissive Waste.*

A tenant for years is liable for permissive waste, and therefore

A lease by a tenant for life under 40 & 41 Vict. c. 18, s. 46, exempting the lessee from liabilities for "fair wear and tear and damage by tempest" is void as "made without impeachment of waste."

In granting such a lease the tenant for life has a discretion as to what are proper covenants, and the lease will be void only when there is an outrageous omission of covenants.

Nugent v. *Cuthbert* (1) distinguished.

THIS was the trial of an action brought by *Thomas Davies* the younger, as heir to his mother, *Mary Davies,* deceased, against his stepfather, *Thomas Davies* the elder, claiming (amongst other things) to have a lease of an inn and a blacksmith's shop and other hereditaments in the county of *Brecon,* made by *Thomas Davies* the elder, as tenant by the courtesy after the death of his wife *Mary Davies,* declared not to be a valid exercise of the leasing power conferred by the *Settled Estates Act,* 1877 (40 & 41 Vict. c. 18), s. 46, and to have the lease cancelled.

The lease was dated the 28th of October, 1885, and was made between *Thomas Davies* the elder, of the one part, and *William Davies* of the other part; and thereby *Thomas Davies* the elder (the lessor), in exercise of the power conferred upon him by the *Settled Estates Act,* 40 & 41 Vict. c. 18, demised unto *William Davies* (the lessee) the inn and the shop and the other hereditaments in the county of *Brecon,* for the term of twenty-one years at the yearly rent of £34. The lessee covenanted to pay the rent and to insure, and that he would "at all times during the said term keep the said premises in good and substantial repair and the same in good and substantial repair deliver up to the lessor at the expiration or sooner determination of the said term, fair wear and tear and damage by tempest excepted."

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(1) Sugden on Real Property, p. 475.

Warmington, Q.C., and *Upjohn*, for the Plaintiff:—

This lease was made for the express purpose of depriving the Plaintiff of the use of the blacksmith's shop, and should not be favoured. The Act 40 & 41 Vict. c. 18, s. 46, requires that leases granted by tenants for life should "be not made without impeachment of waste," and the exceptions as to wear and tear and damage by tempest amount to allowing waste. A lessee for years is liable for permissive waste: *Co. Litt.* (1), and therefore this lease is void as exempting the tenant from liability: *Yellowly* v. *Gower* (2). If the lessor covenants to repair, that alone would make the lease void, but here the tenant is expressly exempted from liability. There is no power reserved to enter and see the state of repair, and that being a usual covenant the want of it avoids the lease. A tenant for life granting a lease under this Act is in the position of a trustee and must get the best terms.

Barber, Q.C., and *R. W. Ingham*, for the Defendant:—

The motive has nothing to do with the validity of the lease, and the only question is whether the lease is valid under the Act. Much discretion is given by sect. 46 to the tenant for life. Moreover, a tenant for years is not liable for permissive waste: *Herne* v. *Bembow* (3), and these words do not relieve the lessor from any liability. Besides, the covenant to repair is absolute, and these words of exception occur only in the provision as to delivering up and give no release from the previous covenant, nor do they release the lessee from any legal liability: *Nugent* v. *Cuthbert* (4). *Yellowly* v. *Gower* was quite different, and the principal point was that the rent was not made incident to the reversion. The covenant to repair is more onerous than the ordinary liability for waste, and under it the tenant must repair up to the last hour, and this exception would be no answer to an action for not repairing. The tenant for life would not have been liable for permissive waste, and the lease is beneficial to the reversioner. There is no occasion for power to enter and view a small inn and shop.

(1) 53 a.
(2) 11 Ex. 274.
(3) 4 Taunt. 764.
(4) Sugden on Real Property, p. 475.

J. G. Wood, am. cur., referred to *Barnes* v. *Dowling* as to the liability of tenant for life for permissive waste and handed up the pleadings and judgment in that case (1).

Warmington, in reply.

KEKEWICH, J. (after giving his decision on the other points in this case, continued):—

I now come to the lease which has given rise to much discussion. Mr. *Thomas Davies* was in possession of this public-house and blacksmith's shop and other tenements as tenant by the courtesy, that is to say, he was tenant after the death of his wife for his own life. The *Settled Estates Act* of 1877, besides giving to the Court power on the application of the tenant for life to grant leases of divers kinds under certain conditions, empowered, under sect. 46, a tenant for life to grant a lease for any term not exceeding twenty-one years of any property except the principal mansion-house. There is no restriction whatever, except that it is not to exceed twenty-one years, and that certain conditions are to be observed, those conditions being such as would make it impossible under that clause to grant either a mining or a building lease, even if any one was willing to take a lease of that kind. So that practically the only leases to which the power can refer are ordinary leases, and here we have a lease of a house and shop and tenements adjoining. The first proviso is that the lease is to take effect at or within one year after it is granted. Then it is to be made by deed at the best rent that can be obtained. There has been no suggestion in the argument or in the evidence that the best rent was not obtained. Then it is provided that such demise shall not be made without impeachment for waste; that there shall be covenants for payment of rent, and such other and proper covenants as the lessor shall think fit, and also a power of re-entry. In pursuance of that power the late *Thomas Davies* granted a lease for twenty-one years to the present Defendant, *William Davies*. That was after this action had been commenced, and it is not contested, and of course it could not be, that *Thomas Davies* wished so far as he could to defeat the Plaintiff's wishes by granting a lease to the Defendant. There was no objection to *Thomas Davies* doing what he did. As long as a power of that kind is properly exercised it may be for the benefit of the donee of the power or any one else. All that the tenant for life has to do is to exercise the power according to the statute, and if he has done so the lease is good. The argument therefore resolved itself into this, that the lease was not conformable to the power contained in the statute, and the real and the only question is, not whether there was any honesty or dishonesty, or any other motive than that of making a lease, but whether the lease has in fact been made agreeably to the power.

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(1) It has been reported 44 L. T. (N.S.) 809.

The lease contains a covenant for the payment of the rent, and therefore no exception can be taken on that score. It also contains a covenant to repair, to which I will refer, and covenants for insurance, which seem to me to be of very ordinary character, and also covenants to keep up the license for a public-house—such covenants as you would expect to find in a deed of this kind; but there are other covenants which are not here, and which you often find in a lease of this kind, and it is argued that the lease does not contain "such other and proper and usual covenants as the lessor shall think fit," because that means, not that the lessor is to exercise his discretion about these other proper covenants, but that the covenants which are usual are to be inserted, whether he thinks them fit or not. It is difficult to state the argument in sensible language without reducing it to an absurdity, but I think I have fairly represented the argument which has been addressed to me. In my judgment there is no foundation for the suggestion, on the grammatical construction of this clause, that the lessor is not to use his discretion, whether one or other of the usual covenants is to be inserted or not, provided he keeps within the statute. I wish to adopt Mr. *Ingham's* words, which exactly express what had been passing through my mind, that if there were an outrageous omission of covenants, that would be an element of fraud, and would lead to a different conclusion; but unless there is something of that kind, you cannot control the lessor's discretion, although you might think that it would be better if he had exercised his discretion in a different way.

I have left to the last, because it is the most difficult, the question whether the lease has been made so as to be open to the objection that it is made without impeachment for waste. The words are, "that such demise be not made without impeachment for waste." Now that cannot mean simply that the demise is not to be "to the lessee, his executors, administrators, and assigns, without impeachment for waste." It must mean in substance that the lessee is not to be unimpeachable for waste. Then, I must consider what that implies. It implies that the lessee is not to be free from any obligation as regards waste to which he would be subject if nothing was said in the deed which affected the question. The lessor must not put in any words which would free the lessee from any obligation as regards waste. That, to my mind, is the meaning of the clause. Then to what obligations would he have been subject? Actual waste, that is to say, waste committed by him, would of course render him liable to eviction; but it is said that that does not apply to a case of this kind—that a lessee for years is not liable to an action for permissive waste—that is to say, for allowing waste which has not come about by his own acts, but comes about by a revolution, or by wear and tear, or by the action of the elements, or in any other way not being his own act.

Cases have been cited to shew that a tenant from year to year is not so liable, and I am told that a case was recently argued and decided in a Divisional Court on that subject (1). But it seems to me that on the face of the case that point was not raised. If, when reported, it shews that my judgment is wrong, I must leave counsel to use it as an authority elsewhere. No doubt from time to time there has been a good deal of discussion on this point, and we have the very high authority of the late Mr. Justice *Williams* (2) for saying that some modern decisions had given rise to a doubt whether an action on the case for permissive waste can be maintained against any tenant for years, but he adds that this was stifled by the case of *Yellowly* v. *Gower* (1). That case has been discussed a good deal, but I do not intend to go into it further here than to say that it seems to me to shew that what is said there by Mr. Justice *Williams* as to stifling the question, was also the view of Mr. Justice *Lush* and Mr. Justice *Field*, who heard the case of *Woodhouse* v. *Walker* (2). The decision in that case no doubt went on the ground that there was a condition on the part of the tenant for life to keep the premises in repair. The case also is reported on a point with which we have nothing to do here, namely, as to the person who is entitled to sue (which, apparently, was likewise a question in the case which has been mentioned) but judgment was reserved, and was ultimately delivered by Mr. Justice *Lush*, and he went into the old law, and on page 407 he thus refers to this conflict of modern authorities:—"It is not necessary in this case to enter into the question whether an action on the case for permissive waste can be maintained against a tenant for life or years, upon whom no express duty to repair is imposed by the instrument which creates the estate. The modern authorities, or rather the *dicta* upon this point, appear to be strangely in conflict with the ancient reading of the statutes." I should have no doubt, after reading that sentence, that at any rate both Mr. Justice *Lush* and Mr. Justice *Field* thought as Mr. Justice *Williams* did, that a tenant for years was impeachable for permissive waste. That being so, and myself holding that opinion, I look at the lease to see whether this lessee is freed from the obligation which the law would otherwise impose on him of being liable for permissive waste. [His Lordship read the covenant.] I am asked to read that as if the words of the exception refer only to the later branch of the covenant—that is to say, to the delivery up at the end of the term. A very strange result would follow if that were so, that the lessee would be liable for every day of the term, even on the last day of the term, to keep it in good and substantial repair, and yet when the last day was over, and he was called on to deliver up, he might plead "fair wear and tear and damage by tempest excepted." I think it would be wrong to read the covenant, unless one were forced to do so, in

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(1) *Barnes* v. *Dowling*. It is reported, 44 L. T. (N.S.) 809.

(2) 2 Wms. Saund. 646, Ed. 1871.

(1) 11 Ex. 274.

(2) 5 Q. B. D. 404.

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such a way as to lead to such a strange result, and to my mind the proper construction is not that, but the words "fair wear and tear and damage by tempest excepted" apply to the whole covenant.

The result is that the tenant, although he is liable to the covenant to repair, is not to be liable for any repairs consequent upon or rendered necessary by fair wear and tear, or by damage from tempest. If those words were not there, any dilapidations found at any time or at the end of the term by reason of the wear and tear, the wearing out of the walls and floors of the public-house, for example, from the constant traffic and so forth, he would be liable to replace, and if unfortunately by a storm his chimney-pot was blown down, or he had his roof broken, he would be bound to put it straight, and restore the place to good and substantial repair. From those things he is rendered free by that exception—that is to say, by that exception he is rendered unimpeachable for waste in those particulars. That is just what the statute says he shall not be, and I think that that shews that the provisions of the statute have not been complied with.

I must not part with this case without reference to *Nugent* v. *Cuthbert* (1), which was cited from Lord *St. Leonards*' book on the Law of Real Property as administered in the House of Lords, and at first I was very much puzzled by it, because there the master words were: "so that none of the said leases were made dispunishable of waste by any express words." I do not think that "any express words" add anything to the power there, and I think that the exception as to repair was "casualties of fire and war excepted." On looking through the arguments again, I find that there is an exception as regards fire, and although strangely enough I see nothing about war, I think it may be explained by a sentence in the Respondent's argument, at page 479, where it is said: "Besides, the exception was of that which did not amount to waste, for the word 'casualty' must be construed casualty without default of the tenant." I think the House of Lords must have come to the conclusion that what was excepted was not waste. I do not think that that governs

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(1) Sugden on Real Property, p. 475.

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this case; but if it did, it would not cover the words "damage by tempest." I should still hold that the exception of fair wear and tear was obnoxious to the statute giving the power, and therefore that the lease is bad on that ground. Accordingly I hold that the lease is bad.

Solicitors for Plaintiff: *Schultz & Son*, agents for *G. & C. James, Merthyr.*

Solicitors for Defendant: *Vanderpump & Son*, agents for *W. P. Price, Brecon.*

C. M.

WILSON *v.* BARNES.

[1882 W. 2764.]

C. A.

1885

PEARSON, J.

June 17, 18.

C. A.

1886

May 5.

Manor—Grant of Woods to Copyholders by Crown as Lord—Charitable Purpose—Reparation of Sea Dykes.

By a return to a commission issued by Queen *Elizabeth*, who was lord of a certain manor near the sea, the Commissioners, in consideration of the copyhold tenants undertaking the repair of a sea-dyke which had up to that time been chargeable to the lord, granted to the tenants "that they shall have the woods growing in *W. Wood* for and towards the reparation of" a particular portion of the sea-dykes within the manor.

The surplus proceeds of the wood cut from time to time by the tenants were invested by them, and about the year 1765 they cut down the whole of *W. Wood* (allowing the lord to take possession of the soil), and invested the proceeds.

The sea having receded from the part of the manor protected by the sea-dyke, the copyhold tenants for the time being brought an action in 1882 for a declaration that, subject to the reparation of the sea-wall, they were absolutely entitled to the property representing the invested proceeds of the wood:—

Held, by the Court of Appeal (*Cotton*, *Lindley*, and *Lopes*, L.JJ.), varying the decision of *Pearson*, J., that, upon the true construction of the return, the grant of the wood made by Queen *Elizabeth* constituted a charity or gift for charitable purposes; and a scheme was directed for the management and application of the trust property.

THIS was an action brought by a number of the copyholders of the manor of *Holme Cultram*, in the county of *Cumberland*, on behalf of themselves and all other copyholders of that manor except the Defendants, against the Defendants *Barnes*, *Glaister*, and *Martindale*, and the Attorney-General, in order to obtain a declaration that the first three Defendants were trustees of certain estates called *Swinsty* and *Stankside*, and of all other investments and property vested in or held by them as representing *Wedholme Wood* in the said manor, or the proceeds thereof, for the benefit of the Plaintiffs and all other the copyholders of the manor, subject only to the obligation of maintaining and repairing the sea-dykes within the said manor.

At the time of, and prior to the issue of the commission hereinafter mentioned the manor (which is contiguous to the sea) had been and was a manor or lordship belonging to the Crown, whereof the lands were held by the tenants as customary or tenant-right estates of inheritance by copy of Court roll subject to border service against the Scots, and to payment of fines on admittance, descent, surrender or alienation.

Divers questions having arisen between the Crown and the tenants, Queen *Elizabeth*, as lord of the manor, issued a commission dated the 12th of June in the twelfth year of her reign, under which an arrangement was come to with the tenants which was embodied in a return or certificate dated the 13th of October in the same year. Under this arrangement the Crown accepted the tenants, according to the custom of the lordship, at the usual rents, fines and services, and the tenants in consideration thereof agreed to give to Her Majesty one whole year's rent of all the customary lands "and also to uphold, maintain, and keep from time to time thereafter the reparation of the sea-dykes within the said lordships at their costs and charges which hitherto have been very chargeable to Her Highness, and shall pay all other duties and services as before they have agreed to do." The return then continued: "And we, the said Commissioners, have concluded and agreed to and with the said tenants that they shall have the woods grown in *Wedholme Wood* for and towards the reparation of the sea-dykes within the said lordship of *Holme*, and that they should appoint four of the ancient tenants to oversee and deliver the said woods from time to time as need shall require."

Then, after a direction as to the filling up of vacancies amongst the overseers, the return proceeded: "And the jury saith that the charge of the sea-dykes are to be repaired from the new dwelling-house of *Robert Taylor* at *Skynborneys* to a place called *John Askew's Hole*."

This return or certificate was duly confirmed and exemplified under the Great Seal.

After this arrangement had been made the duties of overseeing and managing *Wedholme Wood* and of maintaining these sea-dykes were performed, not by four ancient tenants, as provided by the return, but by certain sidesmen elected by the tenants of the manor. In course of time the sea receded from the neighbourhood of the sea-dykes that were to be repaired, and no further reparation was required.

In the reign of *William* and *Mary* the Crown sold the manor to a purchaser, who then acquired all the rights at that time vested in the Crown, both in the manor and the woods. Between the years 1761 and 1765 the sidesmen, finding that the wood in *Wedholme Wood* was in a state of decay, cut the whole of it down, and invested the sale moneys in the purchase of hereditaments in *Cumberland*, and then allowed the then owner of the soil of the manor to take possession of the site of *Wedholme Wood*, and such site had ever since been held and cultivated by the owner of the manor for the time being.

The sidesmen had always duly maintained and repaired the sea-dykes either by means of cuttings of timber or out of the moneys arising from the wood or the sale thereof, or the income of their investments, and they accumulated the surplus moneys not required for such maintenance and repair, and invested them from time to time. Such investments were now represented by the above-mentioned estates—*Swinsty*, which was purchased in 1765 for £2310, and *Stankside*, which was purchased in 1871 for £910, a sum of £500 on mortgage, and the sums of £635 and £50 cash.

No claim was made to these properties on behalf of the lord of the manor, and the question was whether under the circumstances the copyholders were entitled to such properties for their own benefit, or whether these properties were subject to a charitable trust.

The action was heard before Mr. Justice *Pearson* on the 17th and 18th of June, 1885.

Cozens-Hardy, Q.C., and *Plummer*, for the Plaintiffs:—

The gist of the whole arrangement made in the reign of *Elizabeth* was that the Crown for valuable consideration granted to the copyholders a *profit à prendre*, the effect of that was that the copyholders were incorporated, the only way in which they could take such a grant was from the Crown and by incorporation: *Chilton* v. *Corporation of London* (1); *Lord Rivers* v. *Adams* (2).

The corporators were intended to take for their own benefit: inasmuch as they undertook in consideration of the grant to be

(1) 7 Ch. D. 735.

(2) 3 Ex. D. 361.

put to expenses which were at the time in excess of the value of the timber that could be got; the presumption, therefore, is that the donor intended the donees to have the personal benefit of any surplus: *Jack* v. *Burnett* (1).

Everitt, Q.C., *Edward Ford*, and *Hough*, for the trustees.

Sir *Henry James*, A.G., and *Stirling*, for the Attorney-General:—

This case does not come within the principle of *Chilton* v. *Corporation of London* (2); there is no necessity for the creation of a corporation; without such necessity a corporation is not created by implication, the grant of the Crown was really a grant of estovers or bote made for the benefit of the inhabitants of the whole district liable to inundation; such grant could be made perfectly well even by a private individual: *Willingale* v. *Maitland* (3).

The purpose is clearly a charitable one, as the reparation of a sea-wall is a public benefit, for it extended not only to the copyholders but to all the inhabitants of the district, and any property that can distinctly be traced (as the property in question here can) is devoted to charitable purposes and will be administered under a scheme: *Attorney-General* v. *Sidney Sussex College* (4); *Attorney-General* v. *Wax Chandlers' Company* (5).

Again, the primary obligation thrown upon and undertaken by the copyholders is the maintenance of the sea-wall, and so long as there is a remote probability of repair being required the fund cannot be parted with.

Cozens-Hardy, in reply:—

Supposing the grant to have been merely of estovers for the purpose of repairing the sea-wall, the copyholders had no right to cut down and sell the timber for any other purpose; the property that came to their hands wrongfully was not impressed with any trust, and in the absence of any one else who can now claim it, it is their own.

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(1) 12 Cl. & F. 812.

(2) 7 Ch. D. 735.

(3) Law Rep. 3 Eq. 103.

(4) Ibid. 4 Ch. 722.

(5) Law Rep. 6 H. L. 1.

PEARSON, J. (after stating the facts of the case, and holding that the Crown had no interest of any description in the properties in question, either by virtue of its prerogative or by virtue of its having been in former days the owner of the woods in question, continued):—

It is said that the grant contained in the return of the Commissioners in the reign of Queen *Elizabeth* constituted a public charity for public uses. To my mind it did nothing of the sort. There is nothing of a public character at all in this grant. It is a case in which the Crown, by virtue of its proprietary rights as lord of the manor, is dealing with its own tenants, and stating what shall be the rights between them in future; and when, 150 years afterwards, the Crown sold this manor, it parted with all the rights it ever had or could have in this wood. The copyholders having cut down the wood and having got certain money in respect of the sale of the wood, from time to time laid that out in the purchase of property, some of which they afterwards sold. They applied the money which arose from the sale of that wood apparently in inclosing some of their own common lands, and with the rest of the surplus funds they acquired some lands which remain at the present day vested in the hands of their trustees, and, as I understand, there is likewise the sum of £500 invested on mortgage and certain cash. That being so, to my mind the copyholders are the persons who are entitled to this property.

If they took only a grant of so much wood as was necessary for the reparation of the dyke, at all events by the transaction as between themselves and the Crown, there is no person at the present moment who can say that they are not entitled absolutely to the property and money which has arisen from the sale of that. That being so, such property and money belongs to the copyholders themselves.

It was urged before me that if it were necessary I ought to treat this as a grant from the Crown which would incorporate the copyholders and make them a corporation for the purpose of taking the benefit of that grant. I do not think it in the least necessary to do that. I think this is nothing more than saying that the rights and customs of the manor as between the lord of the manor and the copyholders shall be such as are stated in the instrument, and that the copyholders maintaining the dyke shall have the power of using the wood obtained from this *Wedholme Wood* for the purpose of the reparation of the dyke. I say nothing as to what is the liability of the copyholders at the present moment to repair the dyke, either as between themselves and the Crown or as between themselves and the lord of the manor, if (which I do not mean to imply) he has any rights against them that he can enforce. But at all events, as it seems to me, the copyholders bargained for certain things which the Crown gave them, and under the circumstances which have occurred since that grant the result is that the copyholders have acquired this property which represents the proceeds of the timber in *Wedholme Wood*, and there is no person at the present moment who can challenge their right to it. That being so it belongs to them. They may have acquired it in the first instance irregularly, but at all events they have acquired it, and if there be no charity they are entitled to peaceful and quiet possession of it.

I must therefore declare that in the events which have happened, the copyholders of the manor of *Holme Cultram* are entitled to this property.

The following was the order made by the Court:—

"Declare that the grant of the woods grown in *Wedholme Wood* made by her late Majesty Queen *Elizabeth* did not constitute a charity or gift for charitable purposes, but was made to the said copyholders absolutely in consideration of the undertaking by the said copyholders to repair the sea-dyke between *Skinburness* and *John Askew's Hole*, and that upon the sale of the timber in *Wedholme Wood* the moneys arising from such sale and the subsequent investments thereof became and have been and are held upon trust for the copyholders of the said manor in the proportions in which such copyholders are liable for the reparation of the said dyke in respect of the tenements held by them of the said manor. But this declaration is to be without prejudice to the rights (if any) of any persons (if any there be) who hold any land within the said manor which was formerly of copyhold tenure but which is now of freehold tenure (if so advised) to come in in this action and claim to share in the trust property."

Inquiries were then directed (1) as to who were the present proprietors of the said manor and in what proportions they were respectively liable for the reparation of the said sea-dyke; and (2) of what the trust property now consisted.

From this judgment the Attorney-General appealed, and the appeal came on for hearing before Lords Justices *Cotton*, *Lindley*, and *Lopes* on the 5th of May, 1886.

Sir *Horace Davey*, S.G., and *Stirling*, for the Attorney-General, in support of the appeal:—

First, under the "Act to redress the misemployment of lands, goods, and stocks of money heretofore given to charitable uses" (43 Eliz. c. 4), gifts (*inter alia*) for the repair of "sea-banks and highways," are gifts for "a charitable use and intent," which may be enforced under the Act.

Secondly, this is also a charitable gift under the general law, for it is a gift for the benefit of the inhabitants, or a particular class of the inhabitants of a district, and therefore a gift for a public purpose, and a charitable trust. Upon this principle the right to fish in an estuary was established as a charitable trust: *Goodman* v. *Mayor of Saltash* (1). So also in a much earlier case, a grant of land for the pasture of cows for the inhabitants of a certain village: *Wright* v. *Hobert* (2). This gift must be one of two things, either a gift to the original copyholders for their own use and benefit in consideration of their undertaking the reparation of the sea-walls, which would create a perpetuity and be a void trust, or else a trust for public purposes, and so a charity: *Attorney-General* v. *Blizard* (3); *Attorney-General* v. *Corporation of Shrewsbury* (4); *Attorney-General* v. *Corporation of Galway* (5).

Cozens-Hardy, Q.C., and *Ashton Cross*, for the Respondents, the copyholders:—

The return to the commission comprised a grant of the woods in *Wedholme* to the copyholders individually in right of their tenements which they might have exercised by having the whole wood cut down at once and the proceeds applied, subject to the control of the overseers, for their own benefit. It was a right appurtenant to the tenements, which went to the successive holders thereof, and the wood having been long since cut down and sold the present holders of those tenements are entitled to have the property which now represents the wood distributed amongst them, subject to their making due provision for the repair of the sea-wall.

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(1) 7 App. Cas. 633.
(2) 9 Mod. 64.
(3) 21 Beav. 233.
(4) 6 Beav. 220.
(5) Beat. 298; 1 Molloy, 95, 103.

This is a statutory title, confirming their own title as copyholders, and vesting this property in them in the same way as housebote, or estovers, or any other commonable right, thus taking the case out of any question under the law of perpetuities. This gift was not at all in the nature of a charitable declaration or trust, it was in the nature of purchase-money paid as part of a bargain with the copyholders for the giving up of some of their rights; and if necessary could be supported as creating the copyholders a corporation for the purpose.

Everitt, Q.C., and *Edward Ford*, for the trustees in whom the property was vested.

Sir *Horace Davey*, in reply.

COTTON, L.J.:—

The question which arises upon this appeal is whether the Plaintiffs, who sue on behalf of themselves and all the other copyholders of the manor of *Holme Cultram*, are entitled to have this property divided amongst themselves and the other copyholders—whether in fact they are entitled to it for their own benefit, or whether there is any such public trust imposed upon it as to create a charitable trust and to enable the Attorney-General to intervene and ask that that charitable trust may be carried into execution. The answer to this question in my opinion depends upon the true construction of a return under a commission issued in the reign of Queen *Elizabeth*. A great part of the manor in which *Wedholme Wood* was situated lay below high water-mark at high tides, and the Queen, as lord of the manor and owner of the soil, was liable to the obligation of repairing the sea-wall which protected the land from the sea. Being thus liable she considered it desirable to make a bargain with the copyhold tenants of the manor and to get them to undertake the reparation of a certain portion of the sea-wall. Whether or not that was the part most exposed at the time one cannot tell, but a commission was issued and a bargain was made with the copyhold tenants that they should undertake to repair a portion of the sea-wall between two points, accompanied by what was equivalent to a grant by the Crown, not apparently of the soil but of the timber of a certain wood in the manor, which manor, I may mention, apparently extended over the whole parish, or practically so.

Now this was undoubtedly a bargain under which the tenants took upon themselves an obligation to which they were not previously liable, and the Crown did something which deprived it of rights it previously had. And we have to consider what was the contract which was arrived at by the Crown, as lord of the manor, and the tenants in concluding the bargain, and what if anything was the effect upon that contract of subsequent events or Acts of Parliament. The words of the return which constitute the bargain, and the grant are these:—[His Lordship then read them, and continued:—] What the tenants undertook was not the repair of the whole sea-wall, which is said to be eighteen miles in length, but of a certain portion of it, and their obligation and the reference to the repairs as regards the woods was limited to that portion of the wall. What, then, is the effect of this?

It is contended on behalf of the copyholders that it is a grant of the wood to them individually and in right of their tenements, so that they might have cut down the wood at once and have applied it, subject to the control of the overseers, for their own benefit—that it was a right appurtenant to their tenements, which went down to successive holders from time to time, and that, the wood having been cut down more than one hundred years ago, the present holders of the copyhold tenements are entitled to have the proceeds of the wood, in other words the money or the property arising from the investment of the proceeds, distributed amongst them subject to their making due provision for the repair of the wall. On the other hand it is said that the purpose for which this grant was made is indicated in the return, and that such purpose is a public purpose under the statute 43 Eliz., c. 4, which specifies the reparation of "sea banks and highways" as amongst the public purposes which are to be considered as charities; and that independently of the statute it is a purpose for the public benefit of all persons occupying lands which but for the sea-wall would be liable to be flooded, and therefore is a charity according to the law of *England*.

In my opinion that is the true construction of this grant.

It is very true that the copyhold tenants took upon themselves a liability to which they were not previously subject, but the mere fact that this was the result of a bargain by them cannot give them for their own private benefit that which the terms of the grant shew to be only given to them for a public purpose. It is to be here remarked that this purpose applies to and exhausts the whole of the wood. It is not that they were to apply so much as was necessary for the purpose of repairing the wall or for the purpose of obtaining funds to repair it with, and to hold the remainder for the benefit of the copyhold tenants, but the sole object pointed at is the repair. It is true that they had undertaken a burden, and that it is to be expected that they should have something in return. But this they have, because although the repair of the sea-wall is a public purpose, it is a public purpose by which the copyhold tenants would be the persons principally benefited. It is said that at that time there were no freehold tenants of the manor, and that a very large portion of it was below the level of high tide, so that although there is a public purpose constituting a charity, it is one the great benefit of which was obtained by the copyhold tenants who entered into the bargain. It does not, therefore, to my mind seem at all unreasonable that they should have agreed with the lord and said: "We will now undertake an obligation which you have hitherto borne, and in consideration of this you shall devote for the purpose of repairs to a sea-wall for which we are personally liable, a wood which will probably produce sufficient to enable us to do so." It is now said that the wood produced much more than sufficient, but apparently in times past this was not so, for rates and taxes were from time to time made in aid of the purpose. But that cannot in reality affect the question of what is the proper construction to be put upon the words of the grant in the return, the purpose of which, as I have said, was one for the benefit of all the inhabitants of this low-lying land, and to protect them from being drowned by the sea.

Again, if in construing this not very clear document we are to look at contemporaneous or nearly contemporaneous usage for the purpose of seing what was the real meaning of the parties to the contract, we find that the preponderance of user is strongly in favour of the grant having been for a public purpose only. Such user, it is true, was not always for the purpose of repairing the sea-wall, but was for purposes which were equally public purposes, *i.e.*, the repair of bridges crossing the ditches used for the purposes of draining the uplands and letting the water get down to the sea by sluices through the sea-wall, or again, the repair of the church of the parish which was constituted almost entirely of the manor. It is also to my mind a strong point, that whereas in order to realize its full value timber requires to be cut from time to time, in this case timber was not, when nothing was required for repairing, from time to time cut and the proceeds divided amongst the copyholders, but was left to stand until it became decayed and its value was depreciated, until at last the whole was cut down, and the proceeds invested.

In my opinion, accordingly, the decision of Mr. Justice *Pearson* was wrong, and the declaration ought to be that the grant by Queen *Elizabeth* of the woods grown in *Wedholme* "did constitute a charity or a gift for charitable purposes," that is to say, for the repair of the sea-dyke between the two points abovementioned, and that upon the sale of the timber in *Wedholme Wood* the moneys arising from such sale and the subsequent investments thereof became, and have been, and are, subject to the same trusts; the decree should then go on: "and it being alleged that the income from the trust property is more than sufficient for the reparation of the sea-dyke between those two places, and the Attorney-General desiring that a scheme should be settled for the management and application of the trust property, let there be an inquiry of what the trust property now consists, and refer it to Chambers to settle a scheme for the management of the trust property and the application thereof, such scheme to be settled by the Judge." The purpose indicated in the grant is no doubt a particular portion of the sea-dyke, but in applying it *cy-près*, if the remainder of the dyke requires the application of any part of the fund, the proper mode of applying

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it will be to provide for the repair of the whole of the sea-dyke surrounding this manor, so far as necessary.

LINDLEY, L.J.:—

I have come to the same conclusion. The primary object of the Crown in making the grant, the true construction of which is the real question in this case, was apparently to get rid of the obligation which it was under as owner of the soil of maintaining this sea-dyke. The document in question appears to me perfectly intelligible. In order to provide the tenants with the means of performing the duty thrown upon them of repairing this dyke, this wood, not the soil, but the timber growing and to grow in this wood is set apart and dedicated for the purpose, and it is remarkable that the whole of the wood is plainly disposed of and made applicable for this and for no other purpose.

Now, the rival construction is that this wood is not dedicated for this purpose at all; that the tenants are to be under the obligation of keeping this bank in repair, but that the wood may be applied by them for any purpose they like. This is a startling construction, and one which would destroy the grant for all public purposes; and I cannot so read the document. It is perfectly manifest that according to the old practice the Attorney-General could at any moment have filed an information and have fastened upon this as a trust for the purpose of maintaining this sea-wall. That being the true view of the construction of the document which is the foundation of the whole thing, the decrees of the Court of Exchequer in the time of *James* I., which have been referred to, throw very little light upon the question. The Act of 17 Jac. 1, which was pressed upon us, was a general Act of Parliament, not specially addressed to this particular manor, which, although it may have had the effect of discharging the lord of the soil from the duty of repairing this bank and of throwing such duty on the tenants (which I myself think could not have been done either by the return in the reign of Queen *Elizabeth* or by the recording of it in the Exchequer), still does not touch the point which we have to consider, nor in any way alter the character of the trust, if trust there were, which was imposed upon this wood. And, looking further at what has been done with this timber and the proceeds of the sale of it from the time of Queen *Elizabeth* downwards, the whole of the evidence appears to me much more consistent with the view that this wood was dedicated to a public purpose than with the rival idea that it was the private property of the copyholders. I am satisfied that the latter theory cannot be supported either by the document itself or by subsequent usage.

LOPES, L.J. :—

The question is whether this grant in the time of Queen *Elizabeth*, which clearly passed the whole property in this timber to the copyholders, passed it to them absolutely or for a public purpose. To apply a test. If that timber passed to the copyholders absolutely as their private property, it immediately vested in them, and under such circumstances who can say in what proportions they would have enjoyed it, or how it could have been determined what their individual rights were with regard to using it or cutting it? There is no difficulty in dealing with rights appurtenant to a copyhold tenement, such as turbary, estovers and common, or in determining the individual rights of the persons who claim them, but that would have been impossible in this case. Again, if the contention of Mr. *Cozens-Hardy* is correct, the copyholders could have cut down the wood the day after the grant and have put the proceeds in their own pockets, and, while the burden of maintaining these banks still remained upon the copyholders, there would in after years have been nothing to meet it with. That is in itself strong evidence to shew that it could not be the true construction of the grant to read it as for the private benefit of the copyholders. Then if the grant was not intended as an absolute gift to the copyholders it must have been for a public purpose. I am clearly of opinion that it was for a public purpose, and if so, it was a charity.

I think that the decision of the Court below was wrong and should be varied.

COTTON, L.J. :—

The costs will be dealt with as in the Court below, and we direct a scheme with liberty to apply.

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Solicitors for the Appellant: *Hare & Co.*, agents for *The Solicitor to the Treasury.*

Solicitors for the Respondents, the Copyholders: *Speechly, Mumford, & Landon*, agents for *Hayton & Simpson, Cockermouth.*

Solicitors for the Trustees: *Ullithorne, Currey, & Villiers*, agents for *E. L. Hough, Carlisle.*

W. W. K.

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In re CHRISTCHURCH INCLOSURE ACT.

Charity—Commonable Lands purchased by a Railway Company—Rights of Turbary—Trust for benefit of Occupiers of Cottages—Rights of Lord of Manor, Owners, and Occupiers.

Prior to 1802 the occupiers of certain cottages were accustomed to cut turf on large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which commissioners were empowered to allot lands in severalty to the lord and other persons interested, and to allot to the lord in trust for the occupiers of the cottages portions of the waste for a turf common, to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The commissioners by their award, made in 1806, allotted to the lord of the manor, in trust for the occupiers for the time being of the cottages, 425 acres of waste for a turf common for the use of the cottagers. The commissioners also allotted to the lord and other persons interested portions of the inclosed lands in severalty in lieu of their rights and interests.

A railway company took for the purposes of their undertaking part of the land allotted as a turf common, and the purchase-money was paid into Court.

On a petition by the freeholders of the cottages for the distribution of the fund:—

Held (affirming the decision of *Stirling*, J.), that the owners of the cottages had no claim on the fund; and that the lord of the manor was entitled to such part of the fund as represented the value of the soil in the land taken by the company:

And *held* (reversing the decision of *Stirling*, J.), that the remainder of the fund was to be held as a charitable trust for the benefit of the occupiers of the cottages.

Goodman v. *Mayor of Saltash* (1) discussed.

THIS was an appeal from a judgment of Mr. Justice *Stirling* (2).

The facts and the sections of the Act relating to the question at issue are fully given in the previous report. The following short statement will be sufficient for the purpose of the present report.

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(1) 7 App. Cas. 633.

(2) 35 Ch. D. 355.

In the year 1802, the 42 Geo. 3, an Act was passed "for dividing, allotting, and inclosing certain commonable lands and waste grounds within the parish of *Christchurch* and parish and chapelry of *Holdenhurst*, in the county of *Southampton.*" Prior to that time the occupiers of certain cottages used to cut turf on the commonable and waste lands proposed to be inclosed. By the Act the commissioners were empowered to allot lands in severalty to the lord of the manor and other persons interested, and by the 13th section it was enacted as follows:—

"That the said commissioners shall and they are hereby authorized and required to set out and allot unto and for the lords of the several manors respectively in which the said waste grounds are situated, in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each as were erected on ancient sites, or have now been erected more than fourteen years, in lieu of their rights, or pretended rights, or custom of cutting turves in the said tythings, manors, or liberties [naming them] as shall by virtue of this Act be divided and allotted as aforesaid, so much and such part or parts of the said waste grounds in such respective tythings, manors, or liberties, as the said commissioners shall think proper for a turf common not exceeding in the whole five acres or less than two acres for each cottage or tenant within each tything, manor, or liberty respectively as shall in the judgment of the said commissioners be fit and proper for supplying turves for fuel for the use of such cottages or tenements, and which allotments shall for ever afterwards be managed, and the turf arising therefrom shall be cut, taken, and used by the occupiers of such cottages or tenements in such quantities and at such time or times in every year and in such manner as the said lords of said manors respectively and the churchwardens and overseers of the poor acting for or within such manor, or the major part of them, shall from time to time order and appoint; but such turf common shall not be fed or depastured by any cattle or sheep whatsoever; and that it shall be lawful for the lords of the said manors for the time being to act in the execution of the trusts thereby

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reposed in them by their agents or proxies respectively" to be appointed by writing under their hands.

Sect. 15 enacted: "That it shall be lawful to and for the said commissioners, and they are hereby authorized and required, to set out and allot such plots in quantity of the said waste lands and grounds intended to be divided and allotted which shall so remain as hereinbefore is mentioned as in the judgment of the said commissioners shall be equal in value to one-eighteenth part thereof unto the said several lords of the manor within which the said waste grounds are situate in lieu of and in full compensation for their several rights and interests in and to the soil of the said waste grounds respectively which within such manors shall be awarded by the said commissioners to be divided and allotted under and by virtue of this Act;" and by sect. 16: "The said commissioners shall divide, set out, and allot all such parts of the residue of the said commonable lands and waste grounds intended by this Act to be divided and allotted as shall in their judgment be fit and proper to be divided, allotted, and inclosed, or to be held in severalty unto and for the several owners, proprietors, lessees, and customary tenants thereof, and other persons interested therein in proportion to their several and respective lands, common rights, and all other rights whatever in, over, and upon the common, which said allotments shall be in full bar of and compensation for all rights of the several parties in, over, and upon such of the commonable lands and waste grounds as shall be divided and allotted as aforesaid."

In 1806 the commissioners made their award, by which they allotted portions of the waste to the lords and the owners of lands in lieu of and in compensation for their several interests, and alloted 425 acres of waste for the turf common. It appeared that the practice of cutting turf had fallen into abeyance, and no use had been made of the land, but the lord of the manor in which the turf common was situate had taken steps to vest it in the *Bournemouth* Commissioners for the benefit of the town.

A small portion of this turf common, about 1¾ acres in extent, was taken by the *London and South-Western Railway Company* for the purposes of their undertaking, and the purchase-money, amounting to £1000, was paid into Court.

A petition was presented by the freeholders of the cottages claiming a right of turbary over the turf common, in order to obtain the decision of the Court as to the rights of the various persons claiming an interest in the purchase-money. These were the freeholders of the cottages, the occupiers of the cottages, the lord of the manor, and the Attorney-General, who asserted that the fund was subject to a charitable trust. Mr. Justice *Stirling* decided that the owners of the cottages had no claim to the fund; that the persons interested in it were the lord of the manor and the occupiers of the cottages; and that the rights of the occupiers were in the nature of a perpetual trust created by the Legislature, and were not charitable.

From this decision appeals were presented by the Attorney-General and by the freehold owners of the cottages.

Sir *R. Webster*, A.G., *Elton*, Q.C., and *Ingle Joyce*, for the Attorney-General:—

We contend that this is a charity for the benefit of the occupiers of cottages. A charitable trust accounts for an allotment to the lord in trust, better than a supposition that this was a peculiar way of dealing with private rights. The Act must be considered as creating a public interest according to the principles laid down in *Goodman* v. *Mayor of Saltash* (1). Where property is dedicated to a general public purpose for the benefit of rich as well as poor, that is a charity: *Jones* v. *Williams* (2). Here the purpose is mainly for the benefit of the poor, which is all the more in favour of its being a charity.

In *Wilson* v. *Barnes* (3) property representing the surplus income and sale moneys of woods given to copyholders by Queen *Elizabeth* as lord of a manor for the purpose of repairing a sea-wall was held to be the subject of a charitable trust.

[13 Geo. 3, c. 81, ss. 8 and 9, was also referred to.]

Sir *H. Davey*, Q.C., *Robinson*, Q.C., and *R. Cust*, for the owners of cottages:—

We contend that there was no gift to the occupiers of cottages either directly or by means of a charitable trust, but that a gift was made in lieu of a right which could only arise through the owners of the cottages, though exerciseable only by the occupiers. When the land is turned into money, the question is to whom does the money belong? Mr. Justice *Stirling* distributed the income among the cottagers in perpetuity. That is establishing in substance a charitable trust, though the Judge denied the existence of one. The trust must either be a charitable trust or a trust for the owners of the cottages. The key to the interpretation of the clauses is in the words "in lieu," which shew that the provision was made in substitution for rights exercised by the occupiers of cottages. But the occupiers sustained no loss, and cannot be regarded as having any claim to compensation: *Dean of Ely* v. *Warren* (1); *Austin* v. *Amhurst* (2).

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(1) 7 App. Cas. 633.

(2) Amb. 651.

(3) Cited as unreported, but see *ante*, p. 507.

W. Pearson, Q.C., and *Ribton*, for Sir *G. Meyrick*, the lord of the manor:—

The questions are, first, whether any charitable trust had been created; and if so, then secondly, whether such charitable trust exhausts the entire beneficial interest in the soil.

It is material to look at the state of matters before the passing of the Act. The site of *Bournemouth* was originally a decoy pond, and before the passing of the Act, the ancestor of the present lord of the manor was entitled to the entire beneficial right in all the wastes, subject only to the commonable rights, and so long as he did not disturb the commoners in the exercise of their rights; and the only right they had was the right of common of turbary.

Now the statute of 42 Geo. 3 created no new or additional rights, nor any rights other than those existing previously to that Act. All it did was to define the area over which the existing rights should be exercised in future; and the whole waste, with the exception of a residuum, was allotted. There were at that time eighty-three tenements, the ownership of which was divided amongst thirty-three owners, each of whom would have been entitled to his allotment by virtue of one or other of his holdings. The annual value of these tenements is nowhere mentioned in the Act, but some of them at any rate were not the cottages of paupers or poor persons. They were of a substantial character, and some of the owners were tenants of large houses. It was not a charitable trust at all.

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(1) 2 Atk. 189.

(2) 7 Ch. D. 689.

[LINDLEY, L.J.:—What was the trust for?]

It was for the purpose of defining that everything the lord had was to be subject to this trust, and that he was not to improve against the objects of it.

Secondly, supposing it to be a charitable trust, does it, as the Attorney-General contends, exhaust the whole beneficial interest? We submit that it does not. The railway company took the whole of the soil, and the purchase-money they paid represents the entire ownership of the soil. The lord is still entitled to every right he originally had, subject only to a trust which cannot be more extensive than the right to cut turves for which it was substituted, and he is consequently entitled, now that this right is gone, either to the whole purchase-money, or to the whole less so much as can be properly attributed as representing the right of turbary: *Reg.* v. *Inclosure Commissioners* (1).

Hastings, Q.C., and *Kenyon Parker*, for the *Bournemouth* Commissioners, supported the contention of the lord of the manor.

Mann, for the tenant in tail in remainder of the manor.

Buckley, Q.C., *Spencer Butler*, and *G. Pemberton Leach*, for the occupiers of the cottages:—

The occupiers had a right and an interest in the land which the Act of Parliament took away. Every person and class of persons whose rights were taken away received allotments by way of compensation for such rights, and this allotment was given to the trustees for a specific purpose, *i.e.*, in trust for the occupiers "in lieu of their rights," and not in lieu of any other rights. The owners have nothing to do with it, and have no interest in the land. And the lord is a mere trustee for the class of persons whose rights are thus provided for, *i.e.*, the occupiers; and it may be that he is a corporation sole for the

(1) 23 L. T. (N.S.) 778.

purposes of the trust. What was allotted was not an incorporeal hereditament, but a price in a corporeal form. Under sect. 16 the allotment to the lord must be treated as made to him in respect of all his "rights whatsoever," so that he is precluded from claiming anything under the allotment now in question; which, it must be borne in mind, is under sect. 3 to be "for ever afterwards managed, and the turf arising therefrom to be cut, taken, and used by the occupiers." These words negative an absolute interest in anyone else; and if the Court should hold this to be a charity, it must be one for the benefit of the occupiers: *Austin* v. *Amhurst* (1); *Bean* v. *Bloom* (2).

Robinson, Q.C.:—*Bean* v. *Bloom* was overruled in *Grimstead* v. *Marlowe* (3).

Sir *R. Webster*, in reply, referred to *Townley* v. *Gibson* (4); *Attorney-General* v. *Heelis* (5).

1888. March 12. LINDLEY, L.J., delivered the judgment of the Court (*Cotton, Lindley,* and *Bowen,* L.JJ.) as follows:—

The question raised by this appeal is, who is entitled to a sum of £1196 2*s.* 11*d.* Reduced £3 per cent. Annuities paid into Court as the purchase-money of some land near *Christchurch*, taken by the *London and South Western Railway Company* in 1884; and the question thus raised turns on the construction of an Inclosure Act passed in 1802, 42 Geo. 3, c. 43, and commonly called the *Christchurch Inclosure Act.* The land taken by the railway company and now represented by the fund in Court was part of a turf common set out and allotted under the provisions of the above Act, and the fund is claimed by the following persons:— (1.) The Attorney-General contends that the whole fund is subject to a charitable trust in favour of the occupiers of certain cottages on whom rights of turbary were conferred by the Act. (2.) The lord of the manor in which the piece of land taken was situate contends that he is entitled to so much of the fund as represents

(1) 7 Ch. D. 689.
(2) 2 W. Bl. 926.
(3) 4 T. R. 717.
(4) 2 T. R. 701.
(5) 2 S. & S. 67.

the value of the soil of the land taken. (3.) The owners of the above-mentioned cottages contend that they are entitled to the fund, or at all events to such part of it as represents the value of the above-mentioned rights of turbary. (4.) The occupiers of the above-mentioned cottages contend that they are entitled to the fund, or at all events to such part of it as represents the value of their rights of turbary. In order to determine which of these conflicting claims are well-founded it is necessary to consider the *Inclosure Act* of 1802.

The material portions are the preamble and the sections numbered in our copies, 9, which declared what wastes and lands were to be inclosed; 10, which authorized the sale of land for the purpose of defraying expenses; 13, which relates to the turf common, and conferred the rights of turbary, the exact nature of which is one of the points for determination; 15, which related to the allotments to be made to the lords of the manors in which the lands to be inclosed were situate; 16, which related to the allotment of the rest of the lands to be inclosed; and 17, which authorized the commissioners to leave unallotted such portions of the wastes mentioned in sect. 9 as might not be worth allotting to individuals. Of these sections the 13th, 15th and 16th are the most important.

[His Lordship read the 13th section, and proceeded:—] First let us consider the effect of the Act on the rights of the lords in the turf common ordered to be set out in sect. 13. These rights depend on their rights before the Act passed; and on the effect of the Act on those pre-existing rights. It is a sound and well settled principle that whatever rights the lords had before must be treated as remaining unaffected except so far as such rights are extinguished or modified by the Act, either expressly or by necessary implication. This was the principle applied in a similar case in *Reg.* v. *Inclosure Commissioners* (1), referred to in the argument, and must be borne in mind in considering the 13th and 15th sections of the present Act. The 13th section, which creates the turf common, does not direct the commissioners to deal with the common in such a way as to deprive the lords of their interests in the soil; it deprives the lords and everyone else

(1) 23 L. T. (N.S.) 778.

in express terms of all rights of pasture, and it deprives the lords by necessary implication of all such other rights as are inconsistent with the enjoyment of the turbary rights created by the section. But the section does no more than this so far as regards the right to the soil; there is no trust declared which exhausts the whole beneficial ownership; moreover, there are indications of an intention not to deprive the lords of more than was necessary for the accomplishment of the limited purposes mentioned in the section; for the section begins by directing the commissioners to set out and allot the turf common "to and for the lords." The section does not take from the lords the soil which was theirs before; but directs the commissioners to set apart and allot that soil to them and for them, but upon trusts which exclude them from their rights to or over the turf on its surface, trusts the object of which is confined to the preservation and enjoyment of the turf. A right to take turf does not include a right to the subjacent soil, and we can find nothing in sect. 13 which warrants us in holding that the lords are deprived by it of their rights to the soil of the common in question. Sect. 15, which relates to allotments to be made to the lords, does not in our opinion throw much, if any, light on this branch of the case. Sect. 15 provides compensation to the lords for what is taken from them, but does not shew what is taken from them. Mr. Justice *Stirling* thought that this turf common was not "divided and allotted" within the meaning of sect. 15. But this turf common is divided from the other lands or, which comes to the same thing, they are divided from it, and the turf common is allotted. But, as already pointed out, it is allotted not from the lords, but "to and for them," and they could not, therefore, require compensation in respect of the turf common except to the extent to which they were deprived by the Act of their former rights over its surface. The words in the Act which appear to be contrasted with "divided and allotted" in sect. 15 are not "set out and allotted" in sect. 13, but the words which occur in sect. 17, which relates to those portions of the wastes which are to be left open as not fit to be divided and allotted. Perhaps, however, we are only expressing in other language what Mr. Justice *Stirling* really meant by his observations on the words in question. Be this as it may, we concur with him in holding that the lord is entitled to so much of the fund in court as represents the value of the soil of the land taken by the railway company.

The next point for consideration is that relating to the owners of the ancient and other cottages, the occupiers of which are entitled to take turf from the common under sect. 13. It was contended on behalf of the owners that the turbary rights created by the Act were in lieu of pre-existing prescriptive rights appendant or appurtenant to the cottages; and that the statutory rights of turbary were in point of law vested in the owners of those cottages, although the occupiers would necessarily be the persons to exercise and enjoy such rights. But when sect. 13 is closely looked at it does not in our opinion warrant this contention. The trust declared is in favour of the occupiers, not of the owners. The owners are nowhere mentioned or alluded to, and if the intention had been to confer the turbary rights on the owners it is hardly conceivable that there should be no indication of such intention in the Act. The argument on behalf of the owners assumes the previous existence of prescriptive rights of turbary, but there is nothing to shew that any such rights existed. We know absolutely nothing of the history or tenure of the cottages referred to; we do not know whether they were held of the lords as copyhold or as freeholds, nor what customs, if any, affected them. Moreover, it is perfectly consistent with sect. 13 that neither the owners nor the occupiers of the cottages had any rights of turbary at all, although it may be inferred that the occupiers of the cottages took turf, and that it was not thought desirable to prevent them from so doing in future. Moreover, if these turbary rights were really conferred on the owners of the cottages, it is not easy to see why much simpler and more appropriate language for the purpose was not used, nor why cottages only fifteen years old should be included. Being completely ignorant of the legal position of the owners and occupiers of these cottages, the only safe course is to adhere strictly to the terms of the Act, and to hold the trust to be in point of law what it is in language expressed to be—namely, a trust for the occupiers for the time being of the cottages, and not a trust for their owners. They, of course, benefit by whatever adds value to the occupation

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of their cottages, but the trust is not a trust for them. Upon this point also we concur with Mr. Justice *Stirling*.

There remains, however, one further matter for consideration—namely, what is the true nature of the trust created in favour of the occupiers of these cottages? The trust, being created by statute, cannot be held invalid on the ground of perpetuity or on any other ground. It is a perpetual trust for the occupiers for the time being of those cottages. But such a trust, unless it is a charitable trust, is one of a very anomalous character, and one which it will be extremely difficult to give full effect to in all contingencies; for example, in the case of the destruction of some of the cottages. Now, although it is competent for the Legislature to create trusts unlike any previously known, we do not think that a trust of that kind ought to be held to have been created if it is equally consistent with the object and words of the statute to hold the trust to be one with which lawyers are familiar and which there is no difficulty in executing. If, therefore, this trust can be properly regarded as a charitable trust, it ought, in our opinion, to be so regarded. Had it not been for the decision of the House of Lords in *Goodman* v. *Mayor of Saltash* (1) we should have felt great difficulty in holding this trust to be a charitable trust. For, although the occupiers of these cottages may have been, and perhaps were, poor people, the trust is not for the poor occupiers, but for all the then and future occupiers, whether poor or not. Moreover, the trust is not for the inhabitants of a parish or district, but only for some of such persons. The trust is for a comparatively small and tolerably well-defined class of persons. The class consists of all the then and future occupiers of the cottages; and there may be several occupiers of one cottage. The class, however, though limited, is as to its members uncertain, and is liable to fluctuation, and the trust for the class is perpetual. This being the case, we are unable to distinguish this case from the trust which both Lord *Selborne* and Lord *Cairns* held to be a charitable trust, and therefore valid, in *Goodman* v. *Mayor of Saltash*. Lord *Selborne* said (2), "I am unable to discover any reason why this should not be a good foundation in law for the right which the appellants claim. If

(1) 7 App. Cas. 633.

(2) 7 App. Cas. 642.

an actual grant, so qualified, were produced, it would be immaterial, whether the word used in it were 'trust,' 'intent,' 'purpose,' 'proviso,' or 'condition,' or whether the trust or duty, imposed on the mayor and free burgesses, were cognizable in equity only, or also at law. In such a grant there would be all the elements necessary to constitute what, in modern jurisprudence, is called a charitable trust. 'If I give' (said Lord *Cairns* in the *Wax Chandlers' Case* (1)) 'an estate to *A.* upon condition that he shall apply the rents for the benefit of *B.*, that is a gift in trust to all intents and purposes.' A gift subject to a condition or trust for the benefit of the inhabitants of a parish or town, or of any particular class of such inhabitants, is (as I understand the law) a charitable trust: and no charitable trust can be void on the ground of perpetuity: *Jones* v. *Williams* (2); *Attorney-General* v. *Mayor of Carlisle* (3); *Howse* v. *Chapman* (4); and see *Attorney-General* v. *Heelis* (5); and *Attorney-General* v. *Mayor of Dublin* (6). In a case cited during the argument of this appeal (*Wright* v. *Hobert* (7)) Lord *Macclesfield* established, as a charitable trust, an ancient grant of land for the pasture, during three months of the year, of the cows of 'as many of the inhabitants' of a certain village, 'as were able to buy three cows,' and during seven months of the rest of the year, 'to be in common for all the inhabitants;' saying, 'that if this manner of grazing had been by prescription or usage, no person but the inhabitants of ancient messuages could be entitled to it, but it is otherwise appointed by the grant of the donors.'" Lord *Cairns* also said (8), "Then I come to the question, is there any difficulty, in that state of things, in supposing what we are bound to suppose if it is possible, an ancient grant to the Corporation of *Saltash* which would explain and reconcile the whole of the practice which we have thus laid before us? It appears to me that there is no difficulty at all in supposing such a grant, a grant to the corporation before the time of legal memory of a several fishery, a grant by the Crown, with a condition in that grant in some terms which are not before us, but which we can easily imagine—a condition that the free inhabitants of ancient tenements in the borough should enjoy this right, which as a matter of fact the case tells us they have enjoyed from time immemorial. A grant of that kind, it appears to me, would be perfectly legal and perfectly intelligible, and there would be nothing in it which would infringe any principle of law. Such a condition would create that which in the very wide language of our Courts is called a charitable, that is to say a public, trust or interest, for the benefit of the free inhabitants of ancient tenements. A trust of that kind would not in any way infringe the law or rule against perpetuities, because we know very well that where you have a trust which, if it were for the benefit of private individuals or a fluctuating body of private individuals, would be void on the ground of perpetuity, yet if it creates a charitable, that is to say a public, interest, it will be free from any obnoxiousness to the rule with regard to perpetuities. That is a principle of the Courts which was very well explained in a well known case in the Court of Chancery which was decided when Lord *Campbell* was Lord Chancellor, a case with regard to *Shakspeare's* house, *Thomson* v. *Shakespear* (1). Indeed it is a principle which has been established in many cases."

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(1) Law Rep. 6 H. L. 21.
(2) Amb. 651.
(3) 2 Sim. 437.
(4) 4 Ves. 542.
(5) 2 S. & S. 76, 77.
(6) 1 Bli. (N.S.) 347.
(7) 9 Mod. 64.
(8) 7 App. Cas. 650.

Mr. Justice *Stirling* considered that the trust for the occupiers was a trust for them as private individuals; but if a trust for all the free inhabitants of ancient tenements in a borough is a trust capable of being upheld as a charitable trust, we are unable to see why a trust for the occupiers for the time being of certain ancient and other cottages more than fifteen years old in a manor, or in several adjoining manors, or in some other specified district, should not be upheld on the same principle. As before stated, nothing is known of the nature of the rights of any of these cottagers before 1802; and it may well be that the trust created in their favour was in fact a statutory gift to them as poor people who in fact enjoyed benefits from the waste to be enclosed, and was a gift made to them to prevent the discontent which would certainly have arisen if they had been deprived of those benefits without any substitute for them. This view is rather supported than not by the description of the cottages, by the exemption of the occupiers from all share of the expenses mentioned in sect. 10, and from the fact that the management of the common and the consequent protection of the rights of the cottagers is intrusted by sect. 13 to the churchwardens and overseers of the poor in conjunction with the lords of the manors. These circumstances do not prove that the trust is charitable, but they tend to support that view, and there is no sufficient reason, in our opinion, why it should not prevail. For these reasons, and upon the authority of the *Saltash* case, we differ from Mr. Justice *Stirling* on this point, and on this alone.

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(1) 1 D. F. & J. 399.

The appeal by the owners of the cottages has wholly failed and will be dismissed with costs. The appeal of the Attorney-General has failed in so far as he sought to have the whole fund declared subject to a charitable trust, but his appeal has succeeded as regards part of that fund. The order appealed from ought to be varied by adding on page 2 the words "And the Court being of opinion that the trusts declared by the said Act in favour of the said occupiers was a charitable trust," and by adding at the end liberty for the Attorney-General to apply. With this variation, the order appealed from will be affirmed, and there will be no order as to the costs of the Attorney-General's appeal, except that the costs of the lord, and of the occupiers, and of the *Bournemouth* Commissioners of the appeal must be paid out of the fund in Court.

Solicitors: *Nicholl, Manisty, & Co.; Crawley, Arnold, & Co.; Burchell & Co.; Hare & Co.; Lovell, Son, & Pitfield; Peacock & Goddard,* agents for *R. D. Sharp, Christchurch.*

M. W.

C. A.
1888
Feb. 20, 21;
March 27.

BARONESS WENLOCK *v.* RIVER DEE COMPANY.

[1886 W. 1293.]

Lands Improvement Company—River Company—Restricted Power of borrowing—Invalid Charge—14 & 15 *Vict. c. lxxxvii., s.* 24—16 & 17 *Vict. c. cliv., ss.* 4, 32, 46, 53.

The *River Dee Company* was by Act of Parliament empowered to borrow upon mortgage of the lands of the company any sums not exceeding £25,000. The company, however, borrowed more. After this the *Lands Improvement Company*, having by its Acts power to advance to landowners money for the improvement of land, advanced to the *River Dee Company* £6405, and by an order the Inclosure Commissioners purported to charge the lands of the *River Dee Company* with the repayment of that sum and interest by annual instalments:—

Held (affirming the decision of *Kekewich*, J.), that the powers given by the *Lands Improvement Company's Acts* did not override the restriction on the borrowing powers of the *River Dee Company*, and that the charge on the lands of the *River Dee Company* was consequently invalid.

Held, also, that a clause in one of the *Lands Improvement Company's Acts* making the certificate of the Inclosure Commissioners conclusive evidence of the validity of a charge under the Act did not render the charge valid in such a case.

THIS was an appeal from a judgment of Mr. Justice *Kekewich* (1).

The facts are shortly as follows:—The *River Dee Company* was constituted by the Act 14 Geo. 2, c. 8, and is regulated by that and subsequent Acts. By one of them, 14 & 15 Vict. c. lxxxvii., s. 24, it was enacted that it should be lawful for the company to borrow upon mortgage of the lands of the company any sums not exceeding in the whole £25,000. The clause is set out in 10 App. Cas. 359.

The *River Dee Company* borrowed from the *Rock Life Assurance Company* £60,000 on the security of a mortgage of lands of the company dated the 22nd of June, 1870. In 1878 Lord *Wenlock*, who had in 1873 advanced £85,000 to the *River Dee Company* on the security of a mortgage of their lands, took a transfer of the mortgage to the *Rock Life Assurance Company*. In an action brought by the executors of Lord *Wenlock* to enforce his securities, it was held by the Court of Appeal that the company was prohibited from borrowing more than £25,000, and judgment was given for the executors for £25,000 and interest, and for so much of the sum advanced by Lord *Wenlock* as was employed in payment of any debts and liabilities of the company properly incurred (1). This judgment was affirmed by the House of Lords (2). The amount chargeable was to be ascertained by a referee. Among the sums claimed by the executors was a sum of £6501 as a liability discharged out of the moneys advanced by Lord *Wenlock* under the following circumstances:—

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(1) 36 Ch. D. 674.

The *Lands Improvement Company* was carried on under the 16 & 17 Vict. c. cliv., and subsequent Acts, for the purpose of advancing to landowners for the improvement of their estates money repayable by annual instalments. The principal sections of the Acts referred to in the argument, namely, 16 & 17 Vict. c. cliv., ss. 4, 32, and 53, and 18 & 19 Vict. c. lxxxiv., ss. 3, 12, are set out in the previous report (3). The *River Dee Company* obtained from the *Lands Improvement Company* a loan of £6405, and by an absolute order dated the 31st of December, 1872, the Inclosure Commissioners charged the inheritance of an estate in the county of *Flint* belonging to the *River Dee Company* (being part of the lands mortgaged to Lord *Wenlock*) with the payment to the *Lands Improvement Company* of twenty-five yearly sums of £429 7*s.* 4*d.* each, being a proportional repayment of the capital sum of £6405, with interest at £4 10*s.* per cent. On the 28th of April, 1873, the sum of £6501 was paid to the *Lands Improvement Company* out of £85,000 advanced by Lord *Wenlock*, and by an instrument under the seal of the *Lands Improvement Company* and dated the 28th of April, 1873, the absolute order charging the lands was discharged and put an end to. The order itself was given up to the *River Dee Company* with receipts indorsed. The executors of Lord *Wenlock* before the referee claimed the benefit of the charge created by the absolute order, and brought an action to establish their claim.

Mr, Justice *Kekewich* was of opinion that no valid charge was

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(1) 36 Ch. D. 675, n.

(2) 10 App. Cas. 354.

(3) 36 Ch. D. 679, n.

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BARONESS WENLOCK v. RIVER DEE COMPANY.

created on the lands of the *River Dee Company* under the Acts of the *Lands Improvement Company*, and gave judgment for the Defendants. The Plaintiffs appealed from this decision.

Rigby, Q.C., and *Methold*, for the Appellants:—

On the authority of *Blackburn Building Society* v. *Cunliffe Brooks & Co.* (1) the Appellants are entitled to stand in the place of creditors of the *River Dee Company* and to have the benefit of the security.

The *River Dee Company* not having the power to borrow from the *Lands Improvement Company* never became debtors to them; but a valid charge was created because the whole transaction was carried out through the Inclosure Commissioners, a public body with a statutory power of charging. This case falls under *In re Knatchbull's Settled Estate* (2). We are in the position of mortgagees in possession of these lands: *Baroness Wenlock* v. *River Dee Company* (3). The learned Judge of the Court below relied on *In re Northumberland and Durham District Banking Company* (4), a case in which *Turner*, L.J., observing upon the 115th section of the *Joint Stock Companies Act*, 1856, rendering the certificates of registration of a company conclusive, says: "If this company was not authorized to be registered, I take it to be quite clear that the certificate of registration can be of no avail." But this authority is not applicable to the present case.

[They also referred to *Scottish Widows Fund* v. *Craig* (5) *Pollock* v. *Lands Improvement Company* (6); and 13 Eliz. c. 20.]

Sir *Horace Davey*, Q.C., *Barber*, Q.C., and *Kirby*, for the *River Dee Compaay*:—

The proposition that one special Act cannot be repealed by another special Act unless by special words of repeal is as old as *Jenkins Reports, Fifth Century, Case XI.*, Ed. of 1734, p. 198, and has been recognised ever since: *Trustees of the Birkenhead Docks* v. *Laird* (7). The other side say this was not a "borrowing," but the Act of Parliament creating it calls it (sects. 26 and 32) an

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(1) 29 Ch. D. 902.
(2) 29 Ch. D. 588, 589, 592.
(3) 19 Q. B. D. 155.
(4) 2 De G. & J. 357, 371.
(5) 20 Ch. D. 208.
(6) 37 Ch. D. 661.
(7) 4 D. M. & G. 732, 742.

"advance" or "a loan." It was in fact a borrowing for the purposes of the *River Dee Company*. It is said that the charge was created not by the *River Dee Company*, but by the Inclosure Commissioners, and that the company undertook no personal liability. But, whoever made the charge, it is a charge upon the land of the landowner, and the Appellants must shew some power to make it. If the charge is not "under this Act" (as is the case) then sect. 53 does not help them: *Hesketh* v. *Local Board of Atherton* (1). Take an analogous case—under the *Building Society's Act* the barrister has to certify the rules, but his certificate would not render valid rules which were not in conformity with the Act or were *ultrà vires*, for example, a rule empowering a borrowing forbidden by the Act: *Laing* v. *Reed* (2); *Murray* v. *Scott*, *Brimelow* v. *Murray* (3); the charge being *ultrà vires* no subsequent assent of the members of the company could make it valid: *Ashbury Railway Carriage and Iron Company* v. *Riche* (4). Therefore the absolute order made by the Inclosure Commissioners on the 31st of December, 1872, neither created a charge on the company's lands, nor any liability on the part of the company. The Appellants' case accordingly fails, for there is nothing for him to follow—neither charge, debt, nor liability.

Then as to the equity of the Appellants, it is of a very remote and shadowy nature, a case of sub-subrogations. Even if the charge were good the Appellants could not derive benefit from it. The release of the £6405 was as good a discharge as could be given. With respect to the *Statute of Limitations*, it would be a bar to the whole of the rent-charge, and as the action is not for the purpose of recovering a rent-charge it would not apply. If, however, the Court of Appeal should differ from Mr. Justice *Kekewich*, it would be open for the company to set up the statute.

Hornell, for the *Lands Improvement Company*.

Rigby, in reply.

1888. March 27. COTTON, L.J.:—

This is an appeal by the executors of Lord *Wenlock* under these circumstances. The late Lord *Wenlock* lent a very large

(1) Law Rep. 9 Q. B. 4.
(2) Ibid. 5 Ch. 4.
(3) 9 App. Cas. 519.
(4) Law Rep. 7 H. L. 653.

sum of money, I think £85,000, to the *River Dee Company*. On an action brought by him to recover that amount it was decided by the other branch of the Court of Appeal, and the House of Lords affirmed that decision, that he could not make any claim as against the *Dee Company* for more than £25,000 on this ground, that one of the Acts of Parliament of the *Dee Company* restrained them from borrowing more than £25,000. In that judgment liberty was granted to the Plaintiff to claim as creditor against the *Dee Company* in respect of any portion of the money lent by him beyond the £25,000 which was applied in paying off debts of the *Dee Company*. That was upon a principle in equity which had been acted on in previous cases, and there was an inquiry directed to ascertain how much of the money lent by him was applied in paying off debts of the *Dee Company*. I mean sums for which they were liable not in respect of the loan made by him. In the course of the investigation it appeared that a sum of £6500, part of the money he advanced, was applied in paying off a charge which had been granted by the Inclosure Commissioners to the *Lands Improvement Company* in respect of certain sums advanced by them under an agreement to which I shall have to refer, and the contention of the Appellants here on behalf of Lord *Wenlock's* estate was, that the *Lands Improvement Company's* Act enabled this charge to be effectually granted as against the land which the *Dee Company* held, that under that they had a good charge by way of annual payment in respect of the £6500, and that the Plaintiffs as representatives of Lord *Wenlock* are entitled to be considered as purchasers of that charge in consequence of Lord *Wenlock's* money having been applied in buying it. The question which we have really to consider is, in my opinion, this, was there a good charge under the order of the Inclosure Commissioners in favour of the *Lands Improvement Company?*

Now undoubtedly the *Dee Company* comes within the definition of "landowner" which is contained in the *Lands Improvement Company's Acts*; and it was urged upon us that this was not a borrowing by the *Dee Company* within the restrictions of the 24th section of their Act of Parliament, and that really it was no borrowing by them; that there was no debt due and owing by the *Dee Company*, and consequently that there is no objection to this charge being a good charge. The 24th section of the Act of 1851 (14 & 15 Vict. c. lxxxvii.) regulating the *River Dee Company* was the section which was held by the Court of Appeal to prevent the *River Dee Company* from borrowing more than £25,000, and in the House of Lords Lord *Blackburn* said that it was an express prohibition, and they had no power to borrow beyond that. There are several Acts regulating the *Lands Improvement Company*, and they contain many provisions with reference to a case like this. Under those Acts there is no charge granted by the landowner whose lands are to be improved; but when an order absolute has been made by the Inclosure Commissioners, who are entitled to do so, then under the Act there is a charge for annual payments so as to extinguish by way of annual payment of principal and interest the sum for which the Inclosure Commissioners gave the order. Now the Inclosure Commissioners were in this position; they had, as I understand the Acts, when an application was made to them for a provisional order, to consider whether the lands would be improved by the work which was proposed to be done, and they had to consider whether the sum which was proposed to be expended in these works was a proper sum to be so expended; and when they had to make the final order on which the Plaintiffs rely they had to see and consider whether the improvement had in fact been made, and whether the sum of money had in fact been spent, but they had no power at all to consider whether the expenditure was made on the land of a person who was entitled to the benefit of the Act. That was a matter which was entirely beyond the consideration of the Inclosure Commissioners. If any objection was raised to the proposed work and the proposed expenditure by any person who had a right to object, then there might be an application to the Court of Chancery to consider whether that objection was well founded. However, there was no such objection in the present case, and it was not, as I understand the case, within the duty of the Inclosure Commissioners to do more than what I have pointed out.

At first reliance was placed on sect. 53 of the *Lands Improvement Act*, 1853 (16 & 17 Vict. c. cliv,), and it was contended

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that the effect of that section was to put a stop to all questions arising as to the validity of the charge, and that was Mr. *Rigby's* first point. That section says, "The execution by the Commissioners of any charge on lands in pursuance of this Act, shall be, both at law and in equity, conclusive evidence, to all intents and purposes, of the contract to which such charge relates having been duly entered into by the proper parties, and of all acts and proceedings by this Act directed with reference to or consequent on such contract having been duly had and done, and of such charge having been duly made and executed, and being a valid charge under this Act, on the inheritance of the lands appearing to be subject thereto." Of course if that entirely excludes any question as to the charge we must hold that the charge was a good and effectual one in favour of the *Lands Improvement Company;* but I cannot agree that that is the proper construction and effect of the clause. In my opinion it establishes that everything which could be done under the Act has been duly and regularly done, but it does not say that if the person who so applied was not a person who could contract with the *Lands Improvement Company*, and who could get a good charge on his land effected by the Inclosure Commissioners, the question as to whether such a charge could be granted is thereby concluded. It is conclusive evidence to shew that the proceedings have been duly taken so far as they could be under the Act before the Inclosure Commissioners. It would conclude all questions as to the works being for the improvement of the land, it would conclude all questions as to whether the money had been expended, and whether the works had been done.

Now the operation might be conducted in two ways. It might be that the *Lands Improvement Company* would themselves do the work with the approval of the Inclosure Commissioners, and then have a final order of the Inclosure Commissioners for the money which they had expended in doing the same. But that was not the course which was taken in this case. Because under sect. 32 there was power for an arrangement to be made by the landowner with the company, that he should do the work, and that then the money should be afterwards advanced by the *Lands Improvement Company*, and then there should be a charge by the

Inclosure Commissioners. That is sect. 32: "Any landowner may enter into a provisional contract with the company for the execution by the company of any of the said improvements on any land in which he is interested; and the money or contract sum for which the company shall agree to execute such improvements may, with such assent of the Inclosure Commissioners as hereinafter provided, be charged as an improvement loan on such land in the manner by this Act provided for charging land with loans for improvement by the company; or any landowner may enter into a like provisional contract with the company for the execution by such landowner under the superintendence of the company of any of the said improvements on lands in which he is interested by means of money to be advanced by the company to the landowner." Here it certainly treats the money as an advance to be made by the company to the landowner, and the previous part of the section clearly provides that a contract may be entered into by the landowner with the company, for the purpose of his doing the works, the money to be afterwards advanced to him; and then it proceeds: "And any such sum of money so advanced by the company shall, together with such commission as shall be approved of by the Inclosure Commissioners be in like manner charged as an improvement loan on such lands." Now, in this case, the proceedings were taken in accordance with the directions of the Act by the *Dee Company*. There was a contract, to which I shall have to refer, entered into; then there was a provisional order by the Inclosure Commissioners and subsequently a final order. The provisional contract recites that certain persons, who are the *Dee Company*, are within the meaning of the *Lands Improvement Company's* Act landowners, and are desirous of executing certain improvements with the sanction of the Inclosure Commissioners, and specified in a schedule to be annexed to their provisional order, by means of money to be advanced by the company. Then it goes on to specify what sum shall be expended, &c.

Now, it is said, that this Act was to enable persons who could not charge their land to obtain improvements of the land by means of work to be done by the company or to be done by means of money to be advanced by the company, but before any such thing can be done, before the work can be done, before the advance can be made by the *Lands Improvement Company*, before there can be any charging order by the Inclosure Commissioners, there must be a contract. In my opinion, that assumes that the landowner is one who has power to enter into a contract of that nature. It was said that a great many persons, such as tenants for life, and ecclesiastical corporations, are within the Act "landowners," and that they cannot charge their land; that is true, but they are able to contract for such a matter although they cannot contract by way of charging their land. We do find, and that I think is material, that there are sections in this Act enabling certain persons who could not otherwise contract, to contract for and in the name and on behalf of the landowner—not to contract to bind the land, because that, as I said, is not the way in which it is to be carried out. We have some clauses here which refer to persons under disability, but, as far as I can see, those sections do not include this present landowner. The 46th section says, "All husbands, guardians, tutors, curators, factors appointed by the Courts in *Scotland*, and committees on behalf of married women, infants, minors, lunatics, idiots, furious or fatuous persons, and all feoffees and trustees, executors and administrators, shall respectively have the same rights and powers of making applications and signifying dissents, and taking other proceedings under this Act, as such married women, infants, minors, lunatics and idiots, furious and fatuous persons," respectively would have if free from disability, or as such feoffees or trustees, executors, and administrators respectively would have, "if the estates, charges, or interests, of which they are such feoffees or trustees, or which are vested in them as such executors or administrators, were vested in them in their own right." That to my mind, shews this, that except where power is by the Act expressly given to those who could not otherwise act, it assumes that the Act is only to apply to persons who have power to contract. Then sect. 32 requires a contract, which is the preliminary of all the proceedings and of all the applications to the Inclosure Commissioners. Could the *Dee Company* contract for the purpose of an advance of money by the *Lands Improvement Company?* In my opinion, it was not intended that the fetter imposed by the Act of 1851 upon the *Dee Company* should be removed by any general expression in this Act of 1853 of the *Lands Improvement Company*. Therefore we have here the fact that when the application was made and when the contract was entered into, those who purported to enter into the contract were existing only under an Act which prevented them from entering into any contract for the advance of money, and therefore, in my opinion, they were not persons who could take proceedings under sect. 32 to enter into a contract, and they were not persons who were entitled to take any proceedings under the subsequent clauses of the Act. Therefore, in my opinion, notwithstanding that the order was made by the Inclosure Commissioners, having due regard to that which could be done under the Act, these persons, the *Dee Company*, were precluded from applying to get a charge on their lands, and the charge which was in fact made by the final order of the Inclosure Commissioners was not a valid charge, and the Plaintiffs are not in a position to say that they are to have this charge as against the lands of the *Dee Company*. In my opinion therefore, the judgment appealed from was right, and the appeal must be dismissed.

LINDLEY, L.J.:—

I have been driven to the same conclusion. I say "driven" because I have studied these Acts with all the care I can in order to see if I could, consistently with sound principles, arrive at a different conclusion. It appears to me to be one calculated to excite a good deal of consideration, especially on the part of those who are engaged in operations under the *Lands Improvement Company's Act* of 1853. But the reason why I cannot avoid the conclusion is this, that in the special Act relating to the *Dee* Commissioners of 1851, sect. 24, there is a power to borrow £25,000 on land, and a power to borrow £25,000 on tolls, and then there are some negative words which say that "there shall not be owing on the securities of the said lands so charged as aforesaid at any one and the same time a greater sum than £25,000, nor upon the security of the said tolls, rates, and duties so charged as aforesaid at any one and the same time a greater sum than £25,000." Now of course that language applies to borrowing under the Act, but it does shew I think a clear intention on the part of the Legislature, when legislating for the *Dee Company*, that the *Dee Company* should not have the power to charge their lands with more than the sum there mentioned. At that time the *Lands Improvement Company's Acts* were not in existence, and the particular method of improving land by charges in the nature of a tithe rent-charge was not present to the mind of anybody, and could not exist in point of law. But we start with this, that the *Dee Company* have no power under their Acts, certainly, to charge their lands with more than £25,000 in any way. Then if one comes to that conclusion on their Acts, the question to be determined is reduced to this, can they be empowered to do this by subsequent Acts, namely, the Acts of the *Lands Improvement Company?* If they are empowered to do it, all well and good, and it can be done; but unless they are empowered to do it their disability remains. Therefore what we have to look for in the *Lands Improvement Company's Act* is some section, not only conferring a power on the *Lands Improvement Company* to improve land by the machinery which is there provided, but if the landowners have no power to charge their lands, to enable them to do so. That is where the case of the lenders really fails. Let us see what enabling clauses there are in the *Lands Improvement Company's Act* of 1853. The most important clause is sect. 32 in the Act of 1853, which says that any landowner may enter into a provisional contract. Then by the definition of "person" in the Act of 1853 and of "landowner" in the subsequent Act of 1855 the language is so wide as to include so far the *Dee Company*. When we come to look at that and to see whether it is consistent with ordinary principles of law to treat persons prohibited from charging their lands as enabled by the general expression "any landowner," I am afraid we cannot do so. I am struck with this, that the Act of 1853 does contain special enabling clauses. The special enabling clauses are sect. 46, which does not include corporations at all, and sect. 27, in which corporations are named, but which section is certainly not so wide as to enable a corporation which could not charge its lands to avail itself of the machinery of this Act of Parliament. Notwithstanding, therefore, the general expression "any landowner" in sect. 32, and applying that as widely as I think we can in law consistently with sound principles, I cannot extend it so far as to apply it to landowners specially prohibited by a prior Act of Parliament from charging their lands. That is the short point to which I have reduced the case. Of course it has taken us a longer time to reduce it to that short point than to express it when reduced. I do not propose to take up time by going through the details of the separate steps by which we are driven to that. I have stated the result of it, which appears to me conclusive.

The only other point which I think it is necessary to mention, is the argument of Mr. *Rigby* on sect. 53, that the certificate of the Inclosure Commissioners is itself to be conclusive. I think it is conclusive as to all matters of machinery, all steps of that kind, but not as to the capacity to enter into a contract. It appears to me the true conclusion to arrive at is this, that the *Dee Company* had no power to enter into this contract or any other contract for the purpose of charging their lands with anything more than the sum mentioned in their Act of Parliament. That being so I think the appeal ought to be dismissed.

BOWEN, L.J.:—

I have arrived with some reluctance at the same conclusion exactly by the same rule.

Solicitors for Plaintiffs: *Emmet, Son, & Stubbs.*

Solicitors for *River Dee Company*: *Ashurst, Morris, Crisp & Co.*

Solicitors for *Lands Improvement Company*: *West, King, Adams & Co.*

M. W.

C. A.
1886
NORTH, J.
Feb. 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25.
1887
Aug. 9.
C. A.
1888
April 16, 17, 19, 20, 21, 23; *May* 2, 8.

In re BROGDEN.
BILLING *v.* BROGDEN.

[1883 B. 776.]

Trustee—Breach of Trust—Duty to enforce Payment of Trust Funds—Admission of Assets—Payment of Legacy by Executors de bonis propriis—Right of Creditor to call on Legatee to refund.

It is the duty of trustees to press for the payment of the trust funds to them, and if they are not paid within a reasonable time to enforce payment by legal proceedings. And it is especially their duty to take action promptly if by the terms of the trust payment has been deferred to the expiration of a specified time.

The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees.

If, in an action against executors for a legacy, the executors admit assets and judgment is given for payment of the legacy *de bonis propriis*:—*Quære*, whether an unpaid creditor can call upon the legatee to refund the legacy.

Semble, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors *de bonis propriis*.

JOHN BROGDEN, a contractor living at *Manchester*, who was engaged in partnership transactions of great magnitude with his sons *Alexander*, *Henry*, and *James Brogden*, made his will dated the 25th of October, 1867, and thereby gave £10,000 to the trustees of the settlement of his daughter, the wife of the Defendant *Samuel Budgett*, and also a legacy of £20,000 with interest at 4 per cent. till paid to his daughter *Mary Jane Brogden* (afterwards the wife of *W. Billing*), namely £17,250 immediately and £2750 after the death of his wife *Sarah Brogden*, and also a legacy of £10,000 to his son *George Brogden*. And the testator directed that no part of the legacies of £10,000, £20,000 and £10,000 should be demanded or claimed or any proceedings taken for having them secured, or any accounts taken until after the expiration of five years from his death, except in case of default by his trustees and executors in payment of the interest thereof.

And he further directed that if at the time of his decease he should be engaged in any partnership in which his sons or any of them were also engaged, all money belonging to him and embarked or remaining in such partnership should be allowed to remain in the hands of such partnership for so long of the period of five years next after his death as any of his sons should continue in such partnership and should require such money to remain, but so that his trustees or executors be paid by the partnership or credited in their books with interest on all such money at 4 per cent. And he appointed his wife and his three sons executors of his said will.

By the settlement made on the marriage of Mrs. *Billing*, dated the 17th of December, 1867, the testator covenanted with *Samuel Budgett*, *Alexander Brogden*, and *James Brogden*, the trustees of the settlement, to pay them £10,000 upon the trusts of the settlement within five years after his death, and an annuity of £300 in the meantime.

By a codicil dated the 17th of December, 1867, the testator revoked the legacy given to his daughter Mrs. *Billing* to the extent of £10,000.

The testator died on the 9th of December, 1869, being at the time still in partnership with his said three sons. The greatest part of the testator's property was locked up in collieries and ironworks belonging to the business carried on by the testator and his partners. After his death the business was still carried on under the firm of *Brogden & Sons.*

On the 15th of March, 1873, the executors passed their residuary account, shewing a clear balance of £12,000 after providing for the payment of the debts and legacies including the three legacies before mentioned. It was alleged by the Plaintiffs that on the expiration of five years from the testator's death his estate was amply sufficient to pay the sum of £10,000 secured by his covenant, and also the sum of £7250, part of the legacy of £10,000 which was then due to Mrs. *Billing's* trustees. Mr. *Billing*, on the 12th of December, 1869, and repeatedly afterwards urged the Defendant *Samuel Budgett* to insist on the payment of these sums, and several applications on the subject were accordingly made by *S. Budgett* to the firm. He appeared, however, to have been unwilling to press the surviving partners for immediate payment for fear of injuring the stability of the firm.

The present action was brought by Mrs. *Billing* and her infant children against the three trustees of her marriage settlement, calling upon them to make good the trust funds. The liability of *Alexander* and *James Brogden* was not disputed.

The correspondence between the parties and the evidence as to the state of the partnership assets and the possibility of realising them between December, 1874, and the time when the firm became insolvent were extremely voluminous. The result is stated in the judgments of the Judges.

The letters which were specially referred to were the following—

The firm having offered certain securities for the sums due, Mr. *Holmes*, of the firm of *Ingle, Cooper, & Holmes*, the Defendants' solicitors, wrote on the 18th of March, 1875, to *Alexander Brogden* as follows:—

"Mr. *Samuel Budgett* has consulted us to-day on the mode proposed to be adopted for the satisfaction of the late Mr. *Brogden's* covenant to pay £10,000 to the trustees of the settlement either during his lifetime or within five years after his decease, and the investment of the money. Mr. *Budgett* is very anxious to meet your views, and impressed this upon us strongly, but we are compelled to advise him that in our opinion the proposed arrangement is not within the scope of the trustees' powers. The investment clause permitting an investment 'upon stocks, funds, shares, debentures, mortgages or securities of any corporation, company, or body municipal, commercial, or otherwise incorporated by Act of Parliament or by private charter or otherwise, in the *United Kingdom*, &c.,' does not in our opinion authorize an investment by the trustees upon mortgage of such shares. It clearly points to a *bonâ fide* investment in their own names in such shares, subject to variation with the consent of Mrs. *Billing* during her lifetime. Moreover, the proposed arrangement is in fact so entire and indivisible that we do not think, if it were impeached, it would ever be held that the payment of the £10,000 under the circumstances was a satisfaction of the testator's covenant."

On the 27th of May, 1875, *Samuel Budgett* wrote to Mrs. *Billing*:—

"In reply to *William's* letter I am very anxious to do all in my power to secure a settlement of your trusts, though it places me in a very unpleasant position with your brothers. The last I heard was from my brother *James* in reference to *Sarah's* (Mrs. *Samuel Budgett's*) interest, but the firm were considering what was the best to be done, but that it would take some time to arrange a definite settlement. I have prepared a letter pressing for a settlement, but could not make up my mind to post it, and I saw Mr. *Holmes*, the solicitor, again last week in reference to it, but I do not like leaving the matter in their hands."

On the 29th of June, 1875, Mr. *Samuel Budgett* wrote to Messrs. *Ingle, Cooper, & Holmes*:—

"As I am leaving home for the continent for a short term I shall be obliged by your again applying to Messrs. *Brogden & Sons* personally, as trustees, for the amounts due to Mrs. *W. Billing* under the marriage settlement and under the will of the late *J. Brogden*. And I shall thank you to take such steps as you deem best to obtain a definite proposal as to the time and mode of payment, having respect as far as possible to the good feeling existing between us."

On the same day, *Samuel Budgett* wrote to Mrs. *Billing*:—

"As I am off to foreign lands I have instructed Messrs. *Ingle, Cooper, & Holmes* again to apply to each of your three brothers for the payment of your claims, and I trust they may take such steps as may secure at least a definite proposal from them, though I do not feel prepared to proceed to extreme measures."

On the 4th of August, 1875, *James Brogden* informed Mrs. *Billing* that the firm had agreed to deposit certain *Dutch South Eastern Railway* bonds and other securities with Mr. *Johnston*, their bookkeeper, to hold for the executors of *J. Brogden's* will, to cover the sums due to the trustees of the *Billing* and *Brogden* settlements. The Defendant, *Samuel Budgett*, was informed of this, but he took no steps to perfect the security, and the bonds were eventually returned by Mr. *Johnston* to the firm.

In October, 1875, a bill was filed by *J. S. Budgett*, one of the trustees of Mrs. *Samuel Budgett's* settlement, for the administration of *John Brogden's* estate, which was stayed in March, 1875, on a security being given to *Samuel Budgett's* trustees for the £10,000 due to them, by the deposit of the deeds of certain freehold estates at *Frampton.*

On the 20th of April, 1876, Messrs. *Brogden* offered to deposit £15,000 bonds of the *Dutch South Eastern Railway Company* and 250 paid-up shares in the *Ulverstone Mining Company* as security for the money due to Mrs. *Billing's* trustees. But this security was declined by *Samuel Budgett.*

In May, 1876, *Samuel Budgett* commenced an action for the administration of the testator's estate, but in September, 1876, proceedings in the action were stayed with the consent of Mr. and Mrs. *Billing*, upon *Alexander, Henry,* and *James Brogden* depositing with *Samuel Budgett,* as temporary security for the payment of the three sums of £10,000, £7250, and £2750, the title deeds of a leasehold colliery belonging to them, called *Merthyr Dare Colliery.*

By an indenture dated the 22nd of September, 1876, to which all the executors of *John Brogden* were parties, after reciting that the executors had received assets more than sufficient to pay the sums payable to the trustees of Mrs. *Billing's* settlement under his covenant, and under his will and codicil, it was witnessed that the title deeds of the colliery should be deposited with *Samuel Budgett* as security for payment of those sums, with interest at £6 per cent., and that a legal mortgage should be granted of the colliery, if required, but that nothing therein contained should prejudice the rights of the trustees of Mrs. *Billing's* settlement against the executors as to the testator's assets.

In November, 1876, a joint stock company called the *Bwlfa and Merthyr Dare Colliery Company* was formed, which purchased the *Merthyr Dare Colliery* from Messrs. *Brogden,* and in October, 1877, *Samuel Budgett* gave up the title deeds of the *Merthyr Dare Colliery* to the company in exchange for £27,000 in debentures of the company. This was done with the consent of Mr. *Billing,* who appears to have been then convinced that the firm could not at that time pay the money in cash.

The firm of *John Brogden & Sons* ultimately became insolvent, and was dissolved and wound up by a judgment in an action in the Chancery Division dated the 26th of July, 1880.

The sums due from the testator's estate were never paid; and the debentures of the colliery company turned out to be a very inadequate security.

The present action was brought by Mrs. *Billing* and her infant children against the executors of the will of *John Brogden* and *Samuel Budgett* seeking to make the Defendants jointly and severally liable for the non-payment of the sums of £10,000 and £7250. Mrs. *Brogden*, on whose death the further sum of £2750 was payable, was living at the time of the commencement of the action, but died in the course of the proceedings. Messrs. *Brogden* being insolvent the main object of the action was to make *Samuel Budgett* liable. In his defence he pleaded that he had been guilty of no default or neglect, but had pressed for the payment of the sums due in every reasonable way; that at the expiration of five years from the testator's death it was found impossible, owing to the depression of trade and other causes, to realize the assets of the testator, which were embarked in the business, at anything like their full value, and that it was for the advantage of all parties interested in the estate, and especially of Mrs. *Billing* and her husband and children, that the realization of the assets of the testator embarked in the business should not be forced. He insisted that from that time to the present it had been impossible to recover the sums due, and that he had taken every step which could reasonably have been taken to obtain payment.

The action came on for hearing before Mr. Justice *North* on the 10th of February, 1886.

Rigby, Q.C., *Barber*, Q.C., and *Northmore Lawrence*, for the Plaintiffs.

Sir *Horace Davey*, Q.C., *Warmington*, Q.C., and *Ingle Joyce*, for the Defendant *S. Budgett*.

Mulligan, for the Defendant *A. Brogden*.

J. Stirling, for the Defendant *J. Brogden*.

Theobald, for the Defendant *H. Brogden*.

1887. Aug. 9. NORTH, J.:—

This action was brought by Mrs. *Mary Jane Billing*, the tenant for life for her separate use without power of anticipation of certain trust funds, to which the other Plaintiffs, her infant children, are entitled in remainder, and the object of the action is to have such funds made good. It is a case of much difficulty, and has occasioned me more trouble and anxiety than any case I ever tried, not merely because of the magnitude of the sum at stake (though that is considerable), nor because its main object is to impose a liability on a trustee whose breach of trust is not alleged to have been caused by dishonesty or bad faith, but because of the absolute impossibility of defining the amount of loss sustained by reason of such breach of trust, or making the liability of the trustee co-extensive only with such loss.

[His Lordship then stated the will and codicil of *J. Brogden*, and referred at considerable length to the correspondence and facts which had been proved in the case and proceeded as follows:—]

The first question I have to consider is whether the Defendant *Budgett* was guilty of any breach of duty in refraining from taking any further steps than he did take to obtain payment of the legacy payable out of this testator's estate to the trustee of the *Billing* settlement; and it must not be forgotten that this is not a case in which there was a discretion vested in trustees with respect to which they could exercise united impartial judgment; for two of the trustees were themselves liable to make good the whole sum, and the Defendant *Budgett* was the sole independent trustee.

The case of *Speight* v. *Gaunt* (1) was relied upon by Sir *H. Davey* as justifying the conduct of Mr. *Budgett*, and no doubt it is a very important and valuable one, and one by which I am, of course, bound. It was contended that this case established the proposition that a trustee was justified in dealing with a trust estate in the manner in which an ordinary prudent man of

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(1) 22 Ch. D. 727; 9 App. Cas. 1.

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business would deal with his own; but I think that is too broad a statement. That was a case in which a trustee had for the purpose of making a proper investment placed funds in the hands of a broker who applied them to his own use. Two points were considered, (1) Was the trustee warranted in employing an agent instead of carrying out the transaction himself? and (2) Was he justified in giving his cash to his agent instead of paying it himself to the persons giving the security? Each question was answered affirmatively upon the ground that a prudent man of business investing his own money upon such a security would in the ordinary course of business have employed a broker and trusted him with the money. In his judgment in the Court below the late Master of the Rolls, Sir *G. Jessel*, used these words (1): "The questions which we have to decide are important not only on account of the amount in dispute, but also on account of the principles which ought to govern the Court in deciding points of this nature. In the first place, I think we ought to consider what is the liability of a trustee who undertakes an office which requires him to make an investment on behalf of his *cestui que trust*. It seems to me that on general principles a trustee ought to conduct the business of the trust in the same manner that an ordinary prudent man of business would conduct his own, and that beyond that there is no liability or obligation on the trustee. In other words, a trustee is not bound because he is a trustee to conduct business in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It never could be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way. If it were otherwise, no one would be a trustee at all. He is not paid for it. He says, 'I take all reasonable precautions and all the precautions which are deemed reasonable by prudent men of business, and beyond that I am not required to go.'"

Lord *Blackburn* also expresses himself thus (2): "The authorities cited by the late Master of the Rolls, I think shew that as a general rule a trustee sufficiently discharges his duty if he

(1) 22 Ch. D. 739.

(2) 9 App. Cas. 19.

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takes, in managing trust affairs, all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. There is one exception to this: a trustee must not choose investments other than those which the terms of his trust permit, though they may be such as an ordinary man of business would select for his own money; and it may be that however usual it may be for a person who wishes to invest his own money, and instructs an agent, such as an attorney, or a stock-broker, to seek an investment, to deposit the money at interest with the agent till the investment is found, that is in effect lending it on the agent's own personal security, and is a breach of trust." It is quite clear that when these learned Judges spoke, as other learned Judges have spoken, of conducting the business of a trust or managing trust affairs as a prudent man would manage his own affairs, they were referring to cases in which the trust business is being done in accordance with the terms of the trust. No one would contend that a trustee might safely ignore the terms of the instrument creating the trust, so long as his disposition of the trust property was such as would have been a prudent disposition of his own. When thus understood, the duty of a trustee not to select investments outside the securities authorized by the trust, is in conformity with and is not an exception to the general rule; a trustee who invests trust funds in an unauthorized manner will be liable for any loss arising therefrom, however wise and safe such an investment of his own funds would be considered; and a trustee who neglects to call in a sum of money which ought to be called in—a sum of money which ought to be called in at once, under the terms of the trust—will be liable for any loss which may arise from his omitting to do so, however safe and prudent it might have been to leave such moneys outstanding, if they had been his own. In my opinion, therefore, Mr. *Budgett's* conduct must be tested not by what a prudent man would have done as to his own moneys, with which he could deal as he liked; but what he would have done with respect to moneys which it was his duty to proceed to call in at the end of five years from the testator's death. In considering this, however, I adopt as my own the very important observations of the late Master of the Rolls (Sir *G. Jessel*), in *Speight* v. *Gaunt* (1),

(1) 22 Ch. D. 746.

inattention to which has, in some cases, I fear, led to trustees receiving rather less than justice. He there says as follows:—"My view has always been this, that where you have an honest trustee fairly anxious to perform his duty and to do as he thinks best for the estate, you are not to strain the law against him to make him liable for doing that which he has done, and which he believes is right in the execution of his duty, without you have a plain case made against him. In other words, you are not to exercise your ingenuity, which it appears to me that the Vice-Chancellor has done, for the purpose of finding reasons for fixing a trustee with liability: but you are rather to avoid all such hypercriticism of documents and acts and to give the trustee the benefit of any doubt or ambiguity which may appear in any document, so as to relieve him from the liability with which it is sought to fix him. I think it is the duty of the Court in these cases where there is a question of nicety as to construction or otherwise to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour, as far as possible, having regard to the whole transaction, to avoid making an honest man, who is not paid for the performance of an unthankful office, liable for the failure of other people from whom he receives no benefit."

Adopting these principles as my guide, I have come reluctantly to the conclusion that I cannot hold the Defendant *Budgett* free from liability. I think he ought to have taken more active steps, and at an earlier time than he did, to get in the money. During the five years for which the obligation to pay was suspended, no steps were taken, no inquiry was made, and no account was asked for. If it is said that the strict line of duty, having regard to the terms of the trust, did not require such a step during that period—the strict line of duty did require such step as soon as that period terminated. But the Defendant *Budgett* did not then take any active steps. His attention was called to it by Mr. *Billing's* letter in December, 1874, and by subsequent letters, and he also received warnings through *James Brogden* as to the position of the firm, but he says he thought the firm quite safe. He never asked what the firm was doing, or to see any account or balance sheet, or took any means to ascertain for himself the position of the partners or their assets. The firm at that time had a very high position, and had a great reputation in mercantile circles: the parties were living in what is called good style, and the Defendant *Budgett* no doubt believed in them, and thought that the money was safe to be obtained in the end, and was unwilling to have any unpleasantness with his brothers-in-law. [His Lordship then referred to some further portions of the evidence, and said that he had come, after full consideration, to the conclusion that the Defendant *Budgett* did not adopt the same course in the performance of the trust that a prudent and careful man would have taken in the management of his own affairs. He then continued:—] It was said that a decision against the Defendant *Budgett* upon this point would make it impossible to find persons who would act as trustees. No doubt it is a thankless and troublesome office, but not so unsafe as is suggested. If the Defendant *Budgett* had himself instituted a suit to execute the trusts of the *Billing* settlement, and had said that he proposed to sue or to forbear from suing to recover the moneys due from the testator's estate, and had applied for the sanction of the Court to the course he contemplated, the Court would have authorized him to sue or to abstain from suing, as the case may be, and in either case he would personally have been perfectly safe whatever the result might have been. The position in which he now finds himself is entirely in consequence of his having chosen to administer the trusts independently instead of under the direction of the Court. If it is said that there can be no doubt in the present case that the Court would have sanctioned the postponement of the action, and that Mr. *Budgett* ought not to be prejudiced because he omitted the formality of applying for that sanction which, if asked for, would have been a matter of course, the answer is, that there is great doubt in my mind whether such sanction would have been given, and if given at all it certainly would not have been given for an indefinite period, but merely for a short time, possibly six months, with a direction that the application should be renewed at the end of that time if the money sought to be recovered should then still remain unpaid.

But the second and equally important question remains for consideration whether, if the Defendant *Budgett* had used due diligence in attempting to recover the trust funds, any good would have resulted therefrom. It is clear that the Court will not punish a trustee pecuniarily for his breach of trust except so far as loss has resulted therefrom to the trust estate. In other words, if no loss has been incurred, or a loss has been replaced before action, there is nothing remaining for the trustee to make good, although, no doubt, the Court might think fit to remove him from the trusteeship.

In *Walker* v. *Symonds* (1) Lord *Eldon* says as follows (2): "I agree with the Master of the Rolls, that inquiry might, on the principles of this Court, have discharged the trustees in given circumstances from breach of trust. If, without previous participation, they, in June, 1795, had found that they, being implicated in no breach of trust till that time, had a co-trustee who had been guilty of a shameful violation of his duty, and immediately exerted themselves to obtain from him a mortgage, which was their object at that time, and used their utmost efforts, instead of filing a bill in this Court against him, which, perhaps, might have destroyed his means of giving security, I should have hesitated long before I charged them, if inquiry had satisfied me that for a simple contract debt due to them they had taken a bond and a mortgage instead of instituting a suit, with the rational hope that by means of the bond and the mortgage they should obtain payment from their co-trustee; in such circumstances, I should readily agree with the Master of the Rolls. But when they take no steps on the arrival of the period at which the bond becomes payable,"&c., and then he refers to the facts of that case, which I need not now refer to, because they are quite distinguishable from the present. But he held that the trustees had not escaped from liability.

In *Hobday* v. *Peters* (3) a policy was assigned to trustees: they never obtained possession of the policy or gave notice to the office: and the assignor first mortgaged and afterwards surrendered the policy; the trustees were held not liable as they had no funds out of which they could have paid the premiums, and if they had sued the assignor it would have been useless, because

(1) 3 Swans. 1. (2) 3 Swans. 71. (3) 28 Beav. 603.

Lord *Romilly* was satisfied upon the evidence that the assignor could not have paid.

In *Ratcliffe* v. *Winch* (1) the Court apparently acted on the same principle, but the report is very meagre.

In *Clack* v. *Holland* (2) the law was stated in terms more favourable to the Defendant *Budgett* than in any other case which I know. Lord *Romilly* says here: "When it is the duty of a trustee or executor to obtain payment of a sum of money, the trustee or executor is exonerated and never required to make good the loss if he has done all he can to obtain payment, but his efforts have not proved successful. Nay more, if he has taken no steps at all to obtain payment, but it appears, that if he had done so, they would have been, or there is reasonable ground for believing that they would have been ineffectual, then he is exonerated from all liability."

At a very early stage of this trial, I asked the counsel for the Plaintiffs and Defendants whether it was not a case for an inquiry, in order to ascertain whether if greater diligence had been used more could have been realised by the *Billing* trustees; but this suggestion was not assented to. The counsel for the Plaintiffs said they were prepared to shew at the trial without further inquiry that the Defendants were liable for the whole amount sought to be recovered. The counsel for the Defendants said that they would prove so clearly that the Defendant *Budgett* was under no liability that no inquiry ought to be directed. Under these circumstances, I could not of course direct an inquiry without hearing fully the case of both sides, and having devoted a period of nearly three weeks to the hearing of the evidence and the arguments of counsel (to whom I am very much indebted for the assistance they gave me), I feel satisfied that no additional inquiry would result in further elucidation of the case, and I proceed to dispose of it finally on the materials now before me.

Applying the language of Lord *Romilly*, already read, to the present case, can I say that the Defendant *Budgett* is exonerated from liability because there is reasonable ground for believing that any further proceeding to compel payment or obtain additional security would have been ineffectual? After very close

(1) 17 Beav. 217.

(2) 19 Beav. 262, 271.

consideration of the case and most careful examination of the evidence, and of the accounts and figures put before me by the expert witnesses for the Defendants, I find myself compelled to answer that question in the negative. The conclusion at which I have arrived is that if due diligence had been used, much more might have been got from the executors than was obtained.

[His Lordship then considered the evidence as to the position and solvency of the firm between 1869 and 1878, and continued :—]

Indeed, I find that in every instance, except at the very end, whenever pressure was used against the firm in such a way as to shew that the parties meant business, either cash or securities to some extent were forthcoming. In particular, I think that if the Defendant *Budgett* had insisted on security early in 1875, or when he first heard of the deposit of securities with Mr. *Johnston* against his claim, he would have got it. In the latter case the securities were actually set aside for the purpose, and I feel assured that a very little pressure would have resulted in an irrevocable appropriation. Instead of applying such pressure, the Defendant *Budgett* ignored the deposit. And again, I am satisfied that if the Defendant *Budgett* had after the execution of the deed of September, 1876, persisted in the demand for further and better security, he would have succeeded in obtaining it, and I am of opinion that vigorous action would have led to the same result at any time down to the middle of 1877.

Under these circumstances I hold that the Defendant *Budgett* ought to have insisted on having the money or good security, and if not conceded, to have commenced an action. If the answer to his demand had been that the firm would not pay, his course would have been clear: if the answer had been that they could not pay, then he should have insisted upon an investigation of their affairs at once in order to see what foundation there was for such statement. But having refrained from prosecution of his claims without any investigation, he cannot say that what he did was for the benefit of his *cestuis que trust*.

I do not believe that any mercantile jury would find as a fact that if Mr. *Budgett* had brought his action promptly and prosecuted it with due diligence, the result would have been the

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bankruptcy of the firm. At all events I find myself unable, after looking at the matter from every point of view and giving it the fullest consideration, to find any reasonable ground for believing that such proceedings would have been ineffectual. On the contrary, I am fully satisfied that such proceedings would have resulted in the recovery of, if not the whole, at any rate a much larger part of the trust funds than is now forthcoming.

As to the amount of the actual loss, I am relieved from difficulty by the conduct of Mr. *Budgett*. It is, of course, impossible for me to say precisely what would have been recovered by such proceedings. The only way in which it could have been ascertained whether the whole or some smaller amount could have been recovered was by the due prosecution of such an action as I have mentioned. And as it is owing to Mr. *Budgett's* negligence that the extent to which he might have escaped liability cannot now be ascertained, I am constrained to hold him liable for the whole amount of £17,250.

As against the Defendants, the *Brogdens*, the case is quite clear upon the admission of assets by them in the residuary account, and in the deed of the 22nd of September, 1876. In fact their liability was admitted by their respective counsel at a comparatively early stage of the trial.

I must therefore declare that the Defendants, *Alexander, James,* and *Henry Brogden*, committed a breach of trust in not paying, and that the Defendant, *S. Budgett*, committed a breach of trust in not enforcing payment of the debt of £10,000 and the legacy of £7250 respectively at the expiration of five years from the date of the testator's death, and that they are jointly and severally liable to make good the same with interest thereon at 4 per cent. so far as the interest has not been kept down, and they must pay the Plaintiffs and the Defendant *Billing* their costs in the action. The sum of £2750, the balance of the legacy of £10,000, had not become payable when this action was commenced, as Mrs. *Sarah Brogden* was then still living; and it is not within the scope of this action.

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From this judgment the Defendant *Budgett* appealed.

The appeal came on to be heard on the 16th of April, 1888.

Sir *H. Davey*, Q.C., and *Warmington*, Q.C. (*Ingle Joyce* with them), for the Appellant:—

There may have been error of judgment on the part of the Defendant *Budgett*, but in order to make him liable it must be shewn that there has been wilful default, and that the course taken by the Defendant has resulted directly in loss to the *cestuis que trust.* The main ground on which Mr. Justice *North* proceeded was that if *Budgett* had brought his action promptly and prosecuted it with due diligence, it would have resulted in the recovery, if not of the whole, at any rate of a much larger part of the trust fund. But we submit that there was no breach of duty on the part of *Budgett*, inasmuch he did all that was his duty to do by taking such steps, and at such time, as in the exercise of his *bonâ fide* discretion as an honest man, and acting under competent advice, he believed to be the best mode of recovering the estate the outstanding debt.

Where, as here, there was any reasonable ground for believing that had legal steps been taken no useful result would have been obtained, the executor or trustee is not liable: *Clack* v. *Holland* (1). A trustee and executor, who is in the position of creditor in respect of a debt due to the trust estate is not in the position of an insurer of the debt, and cannot be made liable for not having obtained, by taking some indirect and extraordinary steps, that which he might have failed to obtain in a due course of administration. Even if there has been any technical breach of duty on his part, *Budgett* ought not to be rendered answerable for the whole sum lost, it not having been shewn that any steps that could have been taken would have resulted in the recovery of more than has been recovered. With respect to the legacy of £7250, if the executors had been forced to pay it, the unpaid creditors would have been entitled to follow the assets, and recover it from the Defendant and his co-trustees. Lastly, we submit that the Plaintiff, Mrs. *Billing*, is not entitled through the neglect or default of her trustee, *Budgett*, to be placed in a better position than any other creditor or legatee.

Mulligan, for the Defendant, *A. Brogden.*

(1) 19 Beav. 262.

Rigby, Q.C., and *Hopkinson*, for the Plaintiffs:—

If *Budgett* voluntarily remained in ignorance of that which it was his duty to know; if he voluntarily abstained from taking steps which he ought to have taken, a sufficient case is shewn for making him liable.

The evidence shews the state of the business to have been such that no mercantile jury ever would find that pressing for payment at the proper time would have driven the firm to bankruptcy. The money would at that time have been forthcoming. The duty to get it in was clear, and the Appellant is liable: *Grove* v. *Price* (1). The Appellant did not exercise a reasonable discretion: *Hiddingh* v. *Denyssen* (2).

[LOPES, L.J., referred to *Learoyd* v. *Whiteley* (3).]

It is incumbent on an executor to shew that he has done all that he could be reasonably expected to do to avert a loss which has occurred. Here for seventeen months the Appellant did nothing but talk. He made no investigation, but accepted as true whatever *Brogden* told him. The onus of proof that the loss could not have been avoided is on the executor: *Styles* v. *Guy* (4); *Tebbs* v. *Carpenter* (5). There was here by continued payment of interest on legacies a sufficient admission of assets before the deed of the 22nd of September, 1876, was executed: *Attorney-General* v. *Chapman* (6); *Corporation of Clergymen's Sons* v. *Swainson* (7); *Barnard* v. *Pumfrett* (8); *Lazonby* v. *Rawson* (9), and the trustee is therefore personally liable. The rule throwing the *onus probandi* on the trustee is a reasonable rule. The Plaintiffs must prove a breach of duty on the part of the trustee and a loss. Then the trustee may defend himself by saying: "If I had done my duty the loss would have occurred all the same," and this case he must prove. Then with respect to the right of the creditors to have the legacy repaid if it had been paid. A creditor cannot have any right against a sum which an executor has paid to a legatee *de bonis propriis*, which would have been the case here, as the executors had admitted assets: *Hawkins* v. *Day* (1). Security used to be taken from a legatee to refund, but this has been given up, and a creditor is allowed to follow the assets. This cannot apply where the Court is not administering assets, but the executor is liable on an administration which binds him personally. After a fund has been distributed, a person who establishes a better title may obtain refunding as in *David* v. *Frowd* (2), which was a very hard case; but in no case do we find more than this, that a person establishing a better title to the assets can follow them. The administration of assets by an executor does not turn money which he pays out of his own pocket into assets. Here it is contended by the other side that, because an executor has by his conduct become obliged to pay a legatee out of his own proper moneys, a creditor can make the legatee refund.

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(1) 26 Beav. 103.
(2) 12 App. Cas. 624.
(3) Ibid. 727.
(4) 1 Mac. & G. 422.
(5) 1 Madd. 290.
(6) 3 Beav. 255.
(7) 1 Ves. Sen. 75.
(8) 5 My. & Cr. 63.
(9) 4 D. M. & G. 556.

[COTTON, L.J.:—I do not understand the Appellant to argue that, I take him to mean that the payment by the executor is to be presumed to be out of assets. I do not at present see how a creditor can claim refunding of anything paid by an executor out of his own moneys, but on whom does the burden rest of shewing whether it was or was not so paid?]

We contend that when a judgment is given against an executor *de bonis propriis* there is no presumption that he has assets. The judgment swallows up the claim against the assets, and the legatee can enforce nothing but the personal judgment. Admission of assets means an admission that the executor has or has had assets enough to pay the demand. His personal liability is not founded on the view that he is going to make a present to the estate, but that he has assets in hand. Having received them he is taken to have them still in hand, except so far as he can shew that he has paid them away for such purposes as will discharge him. Every payment made by him is therefore by intendment of law made out of the assets.

[FRY, L.J.:—Suppose an executor receives assets which he keeps *in specie*, and afterwards a creditor obtains judgment against him *de bonis propriis.* Can the creditor resort to the assets? That would give him a double remedy.]

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(1) Amb. 803.

(2) 1 My. & K. 200.

That a judgment is given on administration of assets cannot take away the creditor's right to follow the assets: *Curtis* v. *Blow* (1).

[COTTON, L.J.:—That case seems to go on the ground that the payment was in fact made out of assets.]

We admit that we cannot obtain a refunding of anything but assets, but we say that the payment must be taken to be made out of assets, and that judgment *de bonis propriis* does not take away a creditor's right to have it refunded.

Sir *Horace Davey*, in reply.

1888. May 8. COTTON, L.J. (after shortly stating the will of Mr. *John Brogden*, and his death, proceeded as follows):—

Now what was the duty of the trustee, Mr. *Budgett*? It was his duty, in my opinion, at the expiration of five years, to call for payment and to take reasonable means of enforcing payment if the executors did not pay the debt and the legacy. And there having been a postponed period during which no steps were to be taken against the partners or against the executors, it was the more his duty at the expiration of that period to assume that the executors had done what it was their duty to do by preparing for paying the debts and paying the legacies of the testator. Although as a rule the executors have a year for winding up the estate and paying all the debts, and for making provision for legacies, yet, at the end of the period they have had already the time to prepare for making the payments which it was their duty to make, whether in the way of debts or in the way of legacies, and it is their duty then to be prepared to pay at once. And, in my opinion, in the case here, it became the duty of Mr. *Budgett* to take active measures immediately after the expiration of the five years—that is immediately the legacy became payable and immediately the debt became payable.

We must therefore consider what he did. The five years

(1) 2 B. & Ad. 426.

expired in the beginning of December, 1874. I do not suggest that during the remainder of that month of December he should have taken any legal proceedings. That would hardly be expected, but what in my opinion he ought to have done, if not in December, 1874, early in the year 1875, was to have demanded payment, and if payment was not made, then he ought to have taken effectual proceedings in order to recover payment both of the legacy and of the debt. I do not say it was his duty to recover them, because that assumes that he could have done so: but in my opinion it was his duty to demand payment of them, and to take effectual proceedings for the purpose of recovering them.

Now, what did he do? On the 12th of December, 1874, Mr. *Billing*, who was anxious, subject to what I shall hereafter mention, to recover payment of the sum settled on his wife and children, wrote to him urging him to see about getting payment of these sums of money. That was on the 12th of December, 1874, and he did nothing as far as one can see—nothing in the way of taking any proceedings at all, till some time in March, 1875. On the 18th of March, 1875, he had an interview with Mr. *Alexander Brogden*, who was the eldest son, and was the senior surviving partner in the firm, and who apparently had the command which his position gave him. Then there is a letter from Mr. *Holmes*, who was consulted by the Defendant, the Appellant here, which throws a light on the steps which he then took. Mr. *Holmes*, of Messrs. *Ingle, Cooper, & Holmes*, writes a letter on the 18th of March, 1875, to Mr. *Alexander Brogden*, he says this:—[His Lordship read the letter and proceeded.] In my opinion this points to what was the great blot in the proceedings taken by Mr. *Budgett*. He did not say "you must pay." He was willing to enter into negotiations for the purpose of getting security. And what seems to have been proposed—we have not got very satisfactory evidence as to what took place at the interview—was that they should have a charge upon certain shares in order to secure the money. I gather from that letter that he did not direct Mr. *Holmes* to demand the payment: he did not say "do not make any doubt about it: have payment. If you cannot have payment, then let the partners see that I am determined, as being the only independent trustee, to do my duty, and to enforce payment from them by such means as are open to me."

Then we come to two other letters, which are the only other ones I shall read, namely, those from Mr. *Budgett* to Mrs. *Billing* of the 27th of May, 1875, and from Mr. *Budgett* to his solicitors of the 29th of June, 1875:—[His Lordship read portions of these letters.] I do not at all say that I have any suspicion that Mr. *Budgett* acted from any self-interested motives, I think it was suggested that his wife had a legacy left to her, and her interests were looked after better than Mrs. *Billing's* interests. I have no such suspicion. What I think is this: it was natural that he should be unwilling to take any active proceedings against his brother-in-law; he trusted him in the belief that this firm, which then stood in good credit, was a perfectly solvent firm, and that the money was safe; and that being so he did not take those proceedings which he ought to have taken to make them understand that it was his duty to obtain payment, and that he must obtain payment from them. He did not take that course, and he takes the risk of whatever the consequences may be.

To proceed with the story. In October, 1875, proceedings were taken, but they were not taken by him. They were taken by his brother, who was a trustee for Mrs. *Budgett.* As I say, I do not at all suggest that that was done to get her any benefit rather than Mrs. *Billing*, but that left the control of the proceedings not in Mr. *Budgett's* hands, and when a settlement was made in March of the following year, it was a settlement only to give security for the legacy and the debt which was due to his brother, the trustee for his wife.

Then, again in May, 1876, he does take proceedings, and does not get any security which can excuse him for the loss of the money, because he took in September, 1876, the security of a leasehold colliery, and although it is possible that if he had at once realized that security in the then state of the market he might have got money enough to pay everything of which he was trustee, yet it was a leasehold colliery; coals went down; there was a difficulty about the rent; the landlord took proceedings; there had to be a large sum paid in order to get that colliery; and when it was realized it realized a sum insufficient

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to provide for the payment of these sums for which Mr. *Budgett* was trustee. That being so it is said that a trustee who is acting as he was, and not without consulting his solicitor, has never been held liable for what must be considered as an error of judgment.

In my opinion that is not the true way to state the case. If he had determined to get payment for this—if he had applied for payment in such a way as to shew that he meant to have it, and had consulted solicitors as to the best mode of proceeding, that might have been an error of judgment. But the conclusion to which I come, having regard to those letters, is this, that he did not do his duty in requiring payment—demanding it, and taking what he was advised were the best means of enforcing payment at least till the period of October, 1876—a late period, when we consider the state of the market as regards coal and iron. In regard to that the evidence is this; that in 1874 coal was in a very good state, collieries were very valuable property. But, although they were good in 1875, and not quite so good in 1876, both coal and iron then went rapidly down; and although in 1874 and 1875 there was a good state of coal and iron, unhappily at a later period that was not the case.

That decides the first question, with regard to which the rule is well laid down by Lord *Cottenham* in the case of *Clough* v. *Bond* (1), that where a trustee does not do that which it is his duty to do, *primâ facie* he is answerable for any loss occasioned thereby.

Then comes this question, if any loss is occasioned, on whom does it lie to shew whether any good would have resulted if the trustee had taken proceedings? Is that for the *cestuis que trust*, who are seeking to make Mr. *Budgett* liable, or is it for Mr. *Budgett* to shew that no good would have resulted? Is it for the *cestuis que trust* to shew that he could have got the money, or for Mr. *Budgett* to shew that he could not have got it if he had taken such proceedings as it was his duty to take?

In my opinion it is not for the *cestuis que trust* seeking to make the trustee liable, to shew that if he had done his duty he would have got the money for which they are seeking to make him answerable. It is the trustee who is seeking to excuse himself for the consequences of his breach of duty. It was his duty to take active proceedings if necessary earlier—to take active proceedings by way of action at law, if necessary; and if the trustee is to excuse himself, it is for him to shew that if he had taken proceedings no good would have resulted from it. Once shew that he has neglected his duty and *primâ facie* he is answerable for all the consequences of that neglect; and in this case the result has been that only a very small sum could be recovered from the security which he took in the year 1876. That being so, has the trustee made out that if he had taken proceedings against the executors—against those who were carrying on the business, he would not have got any good from it? In my opinion he has not made that out, and my reason for thinking so is this—that at the time of the expiration of the five years, and certainly during the early part of the year 1875—probably up to the autumn of that year, the firm of *Brogden & Sons* was in very good credit. Immediately before the expiration of the five years, as I say, coal and iron had both been, as regards vendors, in a very satisfactory state. Coal was at an extraordinarily high price, and iron was good in the market.

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(1) 3 My. & Cr. 490, 496.

Then there was this to be said, not only were the firm in good credit, but the partners were actually during those years which immediately followed December 1874, drawing out very large sums. We have the sums mentioned. I think *Alexander* drew out £26,000; the other partners did not draw out so much, but they drew out very large sums. They had large credits at their bankers, and although undoubtedly they did owe money to their bankers, their drawing account stood in such a state that they had considerable sums which they could call out. And, not only this, they had securities which they could have dealt with and which could have been profitably dealt with at that time.

His Lordship then referred at some length to the evidence on the position and solvency of the firm, and continued:—

Then there is another matter which one must deal with. The £7250 was the legacy, and the £10,000 the debt. It was contended by Sir *Horace Davey*, that if he had recovered the £7250, the legacy, that could have been recovered back by various persons who, interested in various trust funds, were creditors of the testator himself, and that therefore it would be wrong, by holding Mr. *Budgett* liable, to give Mrs. *Billing* and her children a better position than that of the creditors, because if the trustee had got it from the executors of the testator it could have been recovered by the creditors. Of course there are a good many matters to be considered there. The executors had undoubtedly admitted assets. They had been for a long series of years paying interest to the legatees in respect of the debt. They had paid £5000 to the testator's widow, although that apparently had been lent back to them and remained in their hands. But they had admitted assets. It cannot be contended that, with the knowledge they must have possessed of the testator's affairs, the payment of the interest by them during these five years, which they paid in order to prevent the money being called for at once, was not an admission of assets.

Then a question has been raised as to whether if the legatee got payment on an admission of assets and he got judgment *de bonis propriis* of the executors that could be recovered by a creditor in consequence of there being assets. If that were really out of the property of the executor, and not out of the goods of the testator, I do not see how any creditor could have recalled that, because the right of a creditor is to follow the assets, and it is only on that footing that he gets payment of a legacy or calls back a legacy that has been paid when the assets were insufficient.

There has been a serious question on whom the burden lay of proving that the legacy so obtained from the executors was a payment out of the assets of the testator or out of the property of the executor himself. But that is not the only question. We must not only be satisfied that as a matter of law under these circumstances a legacy paid could be recovered, but we must also be satisfied that if payment of this £7250 had been made, the creditors would have taken proceedings to get back the sum which had been so paid. There were creditors, no doubt, in respect of trust funds to a very large amount, but the matter was not in any way entered into at the trial of this action for the purpose of shewing that these were really to be considered as creditors of the testator, nor to shew that there had been no dealings with the other partners so as to exonerate the testator's estate and hold the other partners—the executors here—personally liable in exoneration of the testator's estate. And we find in fact that although those creditors were not paid in full, although there was a transaction between them and the partners in which they released them (apparently treating them as their only debtors)—yet no proceedings have ever been taken for the purpose of recovering any of the sums which had been paid by the executors to those who were interested under the testator's will, nor anything done by those creditors to indicate an intention or a wish on their part to take such proceedings to recover from any person who took by bounty from the testator any sum of money because they were creditors.

In my opinion, therefore, that contention fails as regards the legacy, and we must deal with the legacy on the same footing as the debt which was secured by the covenant of the testator.

I have therefore come to the conclusion that the decision of Mr. Justice *North* must be affirmed. It is an unfortunate position no doubt for Mr. *Budgett*, and I quite think that he believed that the firm were perfectly solvent, and that he was incurring no risk in letting the money remain with them. He ought not to have trusted them; as he did that and his expectations and those of the family have turned out to be wrong, and he has not shewn that no good would have resulted from his performing his duty by pressing for payment, and if necessary by taking proceedings to enforce payment, he must be held liable.

FRY, L.J.:—

We have not in this case to consider whether Mr. *Budgett* throughout acted for what he thought the best; nor whether he did as much for Mrs. *Billing* and her family as he did for his own wife and his family; nor whether he behaved with kindness to the *Brogden* family after they were involved in the difficulties of which we have heard so much in the course of this discussion. But we have to consider two specific questions: Did he perform with due diligence the specific duty which he had undertaken to do by becoming the trustee of Mrs. *Billing's* marriage settlement, and by becoming a trustee of the legacy given to her by her father's will? and, Is it shewn that if he had performed that duty, no good result would have followed to the *cestuis que trust?* Those appear to me to be the two questions which we have to decide in this case.

It has already been pointed out by the Lord Justice *Cotton* that both the sums of money in question, amounting to £17,250, became payable on the 9th of December 1874, and that for five years before that date it had been known that at that date those sums would become payable. It was further known to Mr. *Budgett* that he was joined in these trusts with two gentlemen, both of whom had adverse interests. Whilst it was the duty of the trustee to demand payment, it was probably the interest of Messrs. *Brogden,* who were his co-trustees, to delay the payment. Therefore, it appears to me, looking at all the circumstances of the case, that the duty of the trustee to exercise activity and diligence in getting in the trust fund was more than usually clear on that 9th of December, 1874.

It is not in the least like the case of a fund which becomes payable on the death of a father where it is obvious that the breaking-up of a family, and the sentiments and the feelings which are invoked by such an event, may well account for some delay; but here Mr. *Brogden* had been dead for five years before the legacy became payable, and all persons concerned knew that it had become payable on that date.

It has been urged upon us that if a trustee does as much for his *cestui que trust* as he does for himself, he has performed his duty. I cannot accept for one moment that view of the duty of trustees. A trustee undoubtedly has a discretion as to the mode and manner, and very often as to the time in which and at which he shall carry his duty into effect. But his discretion is never an absolute one; it is always limited by the duty—the dominant duty, the guiding duty—of recovering, securing, and duly applying the trust fund. And no trustee can claim any right of discretion which does not agree with that paramount obligation. Mr. *Budgett* appears not to have seen clearly the duty which he had assumed, and instead of endeavouring to perform the duty, he endeavoured to arrive at some settlement with Messrs. *Brogden* which would save them from the obligation to pay the money, and which I have no doubt Mr. *Budgett* thought was a more desirable arrangement for Mrs. *Billing* and her family than the actual receipt of the money and the investment in some security which would bring in a lower rate of interest than Messrs. *Brogden* were willing to pay.

It has been urged upon us that Mr. *Budgett* early, or without great delay, consulted a firm of skilful and experienced solicitors, and that is perfectly true. But the instructions he gave to them were not to get the money, but to make such an arrangement as should be acceptable to Messrs. *Brogden.* There again it appears to me that Mr. *Budgett* was entirely forgetful of the paramount duty under which he ought to have acted at the time.

I do not follow the history of this case, because it has been already stated with sufficient fulness by Lord Justice *Cotton.* The dates which are the important ones are shortly these. Although Mr. *Billing* immediately after the 9th of December 1874 urges activity on Mr. *Budgett,* he does nothing until March 1875, and even then he does nothing effective. When proceedings are commenced they are not commenced by Mr. *Budgett* himself, but by his brother. When those proceedings are ended by a compromise, the claim of Mrs. *Billing* is left out of the compromise, and it is not until May 1876, that Mr. *Budgett* begins legal proceedings against Messrs. *Brogden,* and I think even then without the real intention speedily to recover the money. They were settled in September 1876 by an unfortunate compromise in which Mr. *Budgett* took security for the property.

That is the short history of the case. In that short history Mr. *Budgett* has not, as it appears to me, shewn diligence in the duty he assumed.

But then it is said by Mr. *Budgett* that no loss has accrued to the *cestuis que trust* by reason of his want of diligence:—he says that if he had been diligent, no greater good would have come to the *Billing* family than has come to them. In my judgment, the burden of sustaining any such argument as that rests distinctly upon the trustee who sets it up. When the *cestui que trust* has shewn that the trustee has made default in the performance of his duty, and when the money which was the subject of the trust is not forthcoming, the *cestui que trust* has made out, in my judgment, a *primâ facie* case of liability upon the trustee, and if the trustee desire to repel that by saying that if he had done his duty no good would have flowed from it, the burden of sustaining that argument is plainly upon the trustee. Has Mr. *Budgett* shewn that, if he had used due diligence at or immediately after December 1874, he could not have done that which it was his duty to do, namely, recover the cash from the persons who were liable to pay it? In my judgment he has not proved that. On the contrary, the conclusion at which I arrive is this: that if he had once made *Alexander Brogden* believe that he meant to have the money, the money he would have had without undue delay.

[His Lordship then referred to the facts in support of the conclusion to which he had arrived, and continued:—]

But, then, another objection has been started which relates only to the legacy, and not to the sum of £10,000 under the covenant. It is said that if Mr. *Budgett* had sued for these moneys, and had recovered them, the large creditors of the firm would have taken proceedings to recover back from the legatees the sums paid. That is an experiment which Mr. *Budgett* might very well have tried. But instead of trying the experiment, and getting the money, and seeing whether it would have been got back, he asks us to conclude that it would have been got back. In the first place there arises the legal inquiry, upon which I do not intend to express any concluded opinion. It is this: the executors had undoubtedly admitted assets. In all probability they would have admitted assets in the action brought by Mr. *Budgett* against them before the judgment. If there had been a judgment *de bonis propriis* for the recovery of the money from the executors, could a legacy so paid have been recovered back by the creditors of the testator? The inclination of my mind is strong to think that the inquiry in every case must be, Was the money so paid part of the assets of the testator? If it was, it can be recovered by the creditors; if it was not, it cannot be so recovered.

But I repeat that I do not found my decision upon the legal point, because we have to consider whether Mr. *Budgett* has in point of fact shewn us that in all reasonable probability an attempt would have been made to recover back the legacy if it had been paid.

[His Lordship then referred to some of the facts in evidence, and continued:—]

This is, to my mind, cogent evidence to shew that the creditors were not active in insisting upon their debts as against the legatees: and I think, therefore, that Mr. *Budgett* has failed in proving that, if he had recovered the legacy from the executors, it would have been demanded back from him by the trust creditors.

My conclusion is that Mr. Justice *North* was perfectly right, and that this appeal fails.

LOPES, L.J.:—

The object of this suit is to impose liability on a trustee. Breach of trust is alleged, but it is free from any suggestion of dishonesty or bad faith. I do not propose to deal with the facts of the case, which have been already fully disposed of by my Lord. I shall be satisfied by stating shortly what I believe to be the law which applies to a trustee circumstanced as the Defendant, Mr. *Budgett*, was in regard to these *cestuis que trust*. I mean a trustee whose duty it was to obtain payment of trust moneys at a specified time. Such a trustee, in my opinion, is bound at the expiration of a specified time to demand payment of the trust moneys, and if that demand is not complied with within a reasonable time to take active measures to enforce its payment, and if necessary, to institute legal proceedings. I know of nothing which would excuse the neglect of such action on the part of a trustee, unless it be a well-founded belief that such action on his part would result in failure and be fruitless, the burden of proving the grounds of such well-founded belief lying on the trustee setting it up in his own exoneration. No consideration of delicacy, and no regard for the feelings of relatives or friends, will exonerate him from taking the course I have indicated.

Applying those principles to the present case, I come to the conclusion that Mr. *Budgett* committed a breach of duty in not taking more active and strenuous measures than he did to obtain payment of the trust funds in question. Fearful of the disruption of family relations, he seems to have been naturally unwilling to incur the odium which would attach to that firm and determined course which he ought to have adopted. It is said that he was actuated by a feeling that enforcing payment of the moneys of which he was a trustee would bring about a failure of the firm and cause the interposition of other creditors, whose claims, conjointly with his own, would lead to the bankruptcy of the *Brogdens.*

I have arrived at this conclusion. The state of the business in 1875; the large sums received by the firm and paid out by the firm at that time, together with other matters which have been alluded to, lead me to think that if proper pressure had been brought to bear at that time the trust moneys would have been paid to Mr. *Budgett.*

A distinction was made between the debt—I mean the moneys due under the covenant—and the legacy. It is said that if the legacy had been paid, the creditors might have compelled the legatee to refund. I think it is unnecessary to consider the difficult questions of law which have been argued upon this subject. I can find no evidence in the case which would justify me in coming to the conclusion that, if the legacy in question had been paid, any attempt to obtain the refunding of the legacy in question would ever have been made.

I am reluctantly, therefore—I say reluctantly, because I believe that Mr. *Budgett* acted throughout in good faith and honesty—compelled to hold that the decision of Mr. Justice *North* ought to be affirmed, and that Mr. *Budgett* must be held liable.

Solicitors for the Plaintiffs: *J. Parker Dixon*, agent for *Needham, Parkinson*, and *Slack, Manchester.*

Solicitors for the Defendant: *Ingle, Cooper, & Holmes.*

M. W.

C. A.

1888

CHITTY, J.

March 12.

C. A.

May 9.

In re EAST AND WEST INDIA DOCK COMPANY.

Railway Company—Railway ancillary to Dock—Railway Companies Act, 1867 (30 *&* 31 *Vict. c.* 127), *ss.* 3, 4 [*Revised Ed. Statutes, vol. xv., p.* 598]—"*Constituted by Act of Parliament for the purpose of making a railway.*"

A company formed by Act of Parliament for the purpose of making a dock, was afterwards authorized, by an Act of Parliament obtained by a railway company, to make a short piece of railway over its own land connected with the line of the railway company, and to work it for through traffic:—

Held, by *Chitty*, J., and on appeal, by *Cotton* and *Fry*, L.JJ. (*Lopes*, L.J., doubting), that the dock company was a company "constituted by Act of Parliament for the purpose of making a railway," and so was a railway company within the meaning of the *Railway Companies Act*, 1867, and that a receiver and manager could therefore be appointed on the application of a judgment creditor:

Held, also, that the receiver and manager must be appointed of the whole undertaking of the company, and not merely of the railway belonging to it.

THE *East and West India Dock Company*, hereinafter called the *Dock Company*, was formed by the Act 1 Vict. c. ix., which consolidated the *West India Dock Company* and the *East India Dock Company*. There was nothing in this Act or in any of the prior Acts relating to either company which was contended to authorize their acting otherwise than as a dock company.

In 1865, the *London and Blackwall Railway Company* were promoting a bill to authorize the construction by them of several lines of railway, two of which, Nos. 1 and 4, would interfere with the property of the *Dock Company*, and the *Dock Company* therefore opposed the bill. Ultimately an agreement of the 25th of March, 1865, was come to between the companies, by which the *Railway Company* was to abandon line 1, and the *Dock Company* to give up its opposition to line 4. The agreement provided that "so much of the said line of Railway No. 4 as passes through any of the lands of the *Dock Company* shall be so made and laid out by the *Dock Company* as to suit the convenience and requirements of the *Dock Company*, and it shall not in any respect be necessary for the said *Dock Company* or their engineer to adhere to the course or direction, or adopt the gradients or curves, or other engineering details of line No. 4 as laid down in the deposited plans, so that the course or direction of the line be not taken beyond the limits of deviation shewn on the deposited plans, and that the gradients or curves be not altered in contravention of the provisions of the *Railways Clauses Consolidation Act*, 1845. The *Dock Company* shall, on receiving three months' notice from the *Railway Company*, at their own cost, proceed to make so much of the said line as passes through any of their lands or property, such work to be executed under the inspection of the engineer of the *Railway Company*, and to be completed within a reasonable period, not less than twelve months from the date of the receipt of the said notice. So much of the said line when made shall remain the absolute property of the *Dock Company*, subject to such rights of user by the *Railway Company* as hereinafter provided. The *Railway Company* shall not at any time work, or suffer others to work, so much of the said line as passes through the lands or property of the said *Dock Company*, by locomotive power. The management of the said line, so far as affects the working thereof, shall, if worked by the *Railway Company*, in all respects be subject to the control of the *Dock Company*, who shall also regulate the number, the times of passage, and the speed of the trains, it being hereby understood and expressed to be the intention of both the parties hereto that the *Dock Company*, and its business, interests, and requirements, shall first be considered, and subject thereto that all reasonable facilities shall be given to the *Railway Company*. The *Dock Company* shall, at their option, if they think fit, have the management of and work so much of the said line of railway as passes through or over their lands or property." The agreement then provided as to the payment of rent by the *Railway Company*, and, in the event of the *Dock Company* working so much of the line as passed over their property, then of a further sum for costs and charges.

The opposition of the *Dock Company* was withdrawn, and the *London, Blackwall, and Millwall Extension Railway Act*, 1865, was passed, whereby, after reciting, among other things, that the construction of railways in the parishes therein mentioned in connection with the *London and Blackwall Railway Company* would be attended with local and public advantage, and that it was

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expedient that such powers of agreement as were in the Act expressed "should be conferred on the company and the several companies respectively hereinafter mentioned; but the purposes aforesaid cannot be effected without the authority of Parliament," powers were given to the *Railway Company* to make a railway to be called the *London, Blackwall, and Millwall Extension Railway.* By sect. 59 it was enacted that "the company and the *East and West India Dock Company* and the *Millwall Canal Company* respectively, may enter into and carry into effect agreements for all or any of the following purposes (that is to say), the construction of the extension railway in or through the property of the said *Dock Company* or *Canal Company*, or over or across the the locks, cuts, channels, yards, and premises of the *Dock Company* and the *Canal Company* respectively—the use and working of the extension railway in or through the premises of the *Dock Company* and the *Canal Company* respectively— . . ." Sect. 60. "The articles of agreement made between the company and the *East and West India Dock Company*, dated the 25th of March, 1865, a copy whereof is set forth in the schedule to this Act, are hereby confirmed, but may be altered or modified as those companies mutually agree, and the powers of this Act, so far as it affects the docks and property of the *East and West India Dock Company*, shall be subject to and shall be exercised only in accordance with the articles of agreement from time to time in force between the two companies."

By an Act of the same session the *London and Blackwall Railway Company* were authorized to let their undertaking to the *Great Eastern Railway Company*, and a lease was afterwards granted.

By the *London, Blackwall, and Millwall Extension Railway Act*, 1868, the time allowed for completion of the railway was extended, and powers were given to the company and the *Great Eastern Railway Company* conjointly to make with the *Dock Company* and *Canal Company* any such alterations in the subsisting agreements and other arrangements as might be requisite to give effect to any of the provisions of the Act; and it was provided that nothing in the Act should exempt the railway from the general provisions of the *Railway Acts.*

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The *Dock Company*, in pursuance of notice from the *Railway Company*, made so much of the extension line as was on their property.

By an Act of 1870 the *Millwall Canal Company* became the *Millwall Dock Company*. It is hereafter called the *Millwall Company*.

By the *Millwall Dock Act*, 1879, the full title of which was "An Act for conferring further powers on the *Millwall Dock Company*, and to authorize certain agreements between them and other dock companies, and for other purposes," reciting among other things that the extension railway, partly belonging to the company, partly to the *East and West India Dock Company* and the *London and Blackwall Railway Company* (the undertaking of which was leased to the *Great Eastern Railway Company*), was worked through the *East and West India Docks* by horse-power, and that it was expedient that the *Millwall Company* and the *Dock Company* (subject to the subsisting agreements between the before-mentioned parties interested in the extension railway) should be authorized to agree as to the terms of the conversion of the extension railway into a line capable of being worked by locomotive engines, and for its use as such both for passengers and goods traffic, after various provisions relating solely to the affairs of the *Millwall Company*, it was enacted (sect. 16) that, "subject and without prejudice to the subsisting agreements between the *East and West India Dock Company* and the *London and Blackwall Railway Company*, and the *Great Eastern Railway Company*, or either of such railway companies, and between the company and the said railway companies, or either of them, the company and the *East and West India Dock Company* may from time to time enter into and carry into effect, vary, and rescind agreements and arrangements for or with reference to the conversion of the section of the *Millwall Extension Railway* passing through the *East and West India Docks*, into a locomotive passenger and goods line, and the use of that section by the two dock companies or either of them by locomotive engines, and the terms, pecuniary or otherwise, and conditions, upon which any of the matters or powers aforesaid shall be done or exercised by the two dock companies or either of

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them." By sect. 17 it was provided that no such agreement or arrangement should prejudice, alter, or affect the provisions of the above agreement of 1865, confirmed by the above Act of that year.

On the 28th of July, 1880, an agreement was made between the *Millwall Company* and the *Dock Company*, whereby, after reciting that the *Millwall Company* were desirous that the *Dock Company* should, as to so much of the railway as passed over their own property, work it by locomotive power, and that the *Dock Company* had agreed so to do upon the terms therein contained, it was agreed (1) that the *Dock Company* should, with all reasonable speed, adapt that portion of the railway to be worked by locomotive power. Clause 2 provided that the *Dock Company* should apply for the sanction of the Board of Trade, and after obtaining it should work the prescribed portion of the railway by locomotive power. By clause 4 the *Millwall Company* agreed to endeavour to obtain the concurrence of the *Great Eastern Railway Company* to the booking and carrying of passengers and goods over their portion of the railway. By clause 6 it was provided that the *Dock Company* should, in the exercise of the rights and powers reserved to them by the agreement of the 25th of March, 1865, continue to have the management of and work so much of the railway as was on their property.

The *Great Eastern Railway* came into this agreement. The *Dock Company* adapted the railway on their land for locomotive traffic, and worked it with locomotive power, not merely for their own local traffic, but for through traffic, the *Great Eastern* receiving the tolls for through traffic, and accounting to the *Dock Company* for the portion attributable to the *Dock Company's* portion of the line. The *Dock Company* worked this portion of the line to a great extent with their own rolling stock.

A debenture-holder of the *Dock Company* having obtained judgment against the company, presented a petition under the *Railway Companies Act*, 1867, to have a receiver and manager appointed of the undertaking of the *Dock Company*. The petition was heard by Mr. Justice *Chitty* on the 12th of March, 1888.

Romer, Q.C., and *Kirby*, for the Petitioner.

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Latham, Q.C., *E. H. Pollard*, and *T. H. Wright*, for the *Dock Company*.

Byrne, Q.C., and *Farwell*, for *Kirk & Randall*, creditors of the company.

Whitehorne, Q.C., and *W. Ford*, for the *London, Tilbury, and Southend Railway Company*, who were interested under certain agreements with the *Dock Company*.

Chitty, J.:—

The question is whether the company, whose corporate title is the "*East and West India Dock Company*," is a company within the meaning of the *Railway Companies Act*, 1867.

The principal objects of the Act, so far as they need be noticed, are, first, to afford protection to the rolling stock and plant of the company used for traffic on their railway against executions; secondly, to enable a judgment creditor to obtain the appointment of a receiver and manager of the company's undertaking; and thirdly, to enable the company to prepare a scheme of arrangement with its creditors, which, if duly assented to by those whose consent is required, and if sanctioned by the Court, becomes binding; and as regards the company and all parties assenting thereto or bound thereby has the effect of an Act of Parliament.

These enactments are beneficial to a company, and to the creditors collectively of a company, to which the Act applies. The protection against executions prevents one creditor from obtaining an undue advantage for himself at the expense of the general body of creditors, and from practically stopping the working of the railway open for public traffic; and the appointment of a receiver and manager operates by way of compensation to the individual creditor in respect of his right to execution which is interfered with, and affords protection to him in common with all concerned, according to their rights and priorities.

The question for decision turns upon the 3rd section of the Act, which defines the companies to which the Act applies. The enactment runs thus:—"In this Act the term 'company' means a railway company; that is to say, a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)."

The section has been analysed and examined critically in the arguments at the Bar. Before stating the facts, I will deal with some of these arguments.

The purpose mentioned in the section need not be the principal purpose for which the company is constituted; it may be an ancillary or subsidiary purpose. This point was decided by the Court of Appeal in the case of *Great Northern Railway Company* v. *Tahourdin* (1). There is here no room for any question of degree, or any question of the relative importance of the purpose in comparison with the other purposes for which the company is constituted; the enactment is satisfied so long as the purpose is one for which the company is constituted, however subordinate it may be. The purpose indicated is not the construction, maintaining, and working of a railway, but the construction, or the maintaining, or the working of a railway.

The term by "Act of Parliament" is not confined to one Act; it embraces any number of Acts. It is not required that the Act or Acts should relate to the particular company exclusively, all that is necessary is that the company should be constituted by some Act or Acts for the purpose mentioned. The term "constituted" is not equivalent to "incorporated;" it is of wider import. It seems to be equivalent to "established." The Act or Acts need not be the Act or Acts by which the company is incorporated; any Act, whether original or subsequent, by which the company is constituted for the purpose of constructing, maintaining, or working a railway, is within the meaning of the section. To put an illustration: if a company were originally incorporated by Act of Parliament for the purpose of constructing and maintaining a canal, and by a subsequent Act the company was authorized to turn the canal into a railway, and to construct and maintain the railway, it would be a company constituted for this latter purpose within the meaning of the enactment.

Part of the argument for the Respondents who opposed the petition turned on a distinction between "power" and "purpose." But the distinction has no practical bearing. Where, by Act of Parliament, a company is incorporated and empowered to construct a railway, the purpose or one of the purposes for which it is constituted is ascertained by reference to the power, and the purpose for which the power is conferred is one of the purposes for which the company is constituted, as was said by the late Master of the Rolls, Sir *George Jessel*, in the case of *Wilkinson* v. *Hull, &c., Railway and Dock Company* (1), "every work which the company is empowered to do is a purpose."

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(1) 13 Q. B. D. 320.

In the present case there are numerous Acts of Parliament relating to the company. The right method appears to me to extract from these Acts, taken as a whole, the nett result, with a view to ascertain whether the purpose of constructing, maintaining, or working a railway is one of the purposes for which this company has been constituted.

I now proceed to state shortly the material facts. The company, which was originally incorporated by Act of Parliament for the purpose of constructing and maintaining docks, has constructed on its own land, and is now maintaining and working a short line of railway. The revenue derived from this part of their undertaking exceeds £10,000 a year. This railway forms part of a longer line. The longer line is used and worked in connection with some of the principal lines of railway in the country. The longer line (Railway No. 4 in the 20th section of the *London, Blackwall and Millwall Extension Railway Act*, 1865), including the part which passes through the company's land, is open for public traffic for passengers and goods, and is being worked by locomotive engines. In fact, the railway is in full operation as a public railway. The part which passes through the company's land, and which, as I have said, is worked by the company, is used in connection with the docks, but not exclusively in connection with the docks; it is used also for through traffic.

Now, obviously it would be *ultrà vires* of a company incorporated for the purpose of constructing and maintaining docks to construct, maintain, and work such a railway as I have described. No one, however, contends that what the company has done and is doing in reference to the railway is *ultrà vires*, and to the question, by what authority the company has done and is doing these things, there is but one answer: by virtue of the powers conferred on it by Act of Parliament. It is not necessary to go through the Acts in detail; it is sufficient to mention them, and to refer to their leading enactments. They are the *London, Blackwall and Millwall Extension Railway Act*, 1865, already mentioned, particularly the preamble, sects. 20, 59 and 60, and the scheduled agreement; the *London, Blackwall and Millwall Extension Act*, 1868, particularly sects. 10 and 18; the *Millwall Dock Act*, 1879, particularly the preamble and sects. 16 and 18; and the agreement of the 28th of July, 1880, entered into under the statutory powers.

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(1) 20 Ch. D. 323, 333.

The effect of these Acts is to alter the original constitution of the company, and to constitute or reconstitute it as a company for the purpose, amongst others, of constructing, maintaining, and working a railway.

For the Respondents who opposed, it was argued that these Acts, not being special Acts of the company itself, that is, Acts promoted by the company, it cannot be properly said that they have altered the constitution of the company; and that if the company itself had promoted such Acts, certain conditions would have had to be complied with before obtaining the Acts, and would, according to the ordinary course of legislation on such subjects, have been imposed on the company. But the effect of this argument is to attempt to introduce into the 3rd section of the *Railway Companies Act*, 1867, words which are not there to be found. The section does not say by special Act of Parliament, or by Act promoted by the company, or by Act relating to the company exclusively: the words of the section are, "by Act of Parliament."

For the same Respondents it was also argued that it was not by virtue of direct enactments contained in the body of the Acts, but by virtue of the agreements scheduled or entered into under the powers of the Acts, that the company had constructed and was maintaining and working the railway. But so long as the powers are conferred by Act of Parliament, it is immaterial how they are conferred. The mode of conferring them is mere machinery. The agreements derive their force and effect solely from the Act of Parliament; and powers conferred through the medium of agreements sanctioned and directed or authorized to be carried into effect by Act of Parliament stand upon the same footing as if they were conferred by direct enactment.

To these reasons I add that in the general provisions of the *Railway Companies Act*, 1867, of which I have already given a sketch in the commencement of my judgment, I can find nothing which requires that a narrow or restricted construction should be put upon the interpretation section.

For these reasons I hold that there is jurisdiction to appoint a receiver and manager.

Kirk and *Randall* appealed from this order, and the appeal was heard on the 9th of May, 1888.

Byrne, Q.C., and *Farwell*, for the appeal:—

We contend that this company is not a railway company within the definition in the *Railway Companies Act*, 1867, s. 3, "a company constituted by Act of Parliament, or by certificate under Act of Parliament, for the purpose of constructing, maintaining, or working a railway (either alone or in conjunction with any other purpose)." It was a company constituted for the purpose of making and maintaining a dock, and it had nothing to do with railways till 1865. The provisions as to a railway in the Act of 1865 and the subsequent Acts are not constituting provisions. A company constituted for the purpose of making a railway enters into heavy responsibilities—it cannot abandon its undertaking without legislative sanction and only in manner provided by the *Railways Abandonment Act*. These provisions bind the *Dock Company* to nothing, they only give it power to enter into agreements for the purpose of preventing the encroachments of the *Railway Company*. The making a railway is no part of a bargain between the *Dock Company* and the Legislature, as is the case in a Railway Act. Here a mere power was given by an Act obtained by another company for its own purposes, and which cannot be considered an Act constituting this company. It would be an extraordinary thing, and one which the Legislature cannot be supposed to have intended, that this *Dock Company* should be turned into a railway company by a clause contained in an Act passed on the application of a railway company, and which would be passed without any *Wharncliffe* meeting of the shareholders in the *Dock Company*. Suppose by agreement between the *Railway Company* and the *Dock Company* the agreement for the *Dock Company* to make this piece of railway was abandoned, could it be said that the *Dock Company* had abandoned any purpose for which it was constituted—it was constituted for no purpose but to make docks. This piece of railway is wholly on land of the *Dock Company*, and that company could make it without any statutory power.

[COTTON, L.J.:—How could it find the funds? It could not employ money raised for the purposes of a dock in making a railway.]

Yes, if it was a useful adjunct for the purposes of the dock.

[FRY, L.J.:—We have heard no evidence that it is useful for the purposes of the dock, and it is used as part of the through communication by rail.]

The mere giving this company power to make a bit of railway, without imposing an obligation to make it, cannot turn the company into a railway company.

But suppose this is a railway company, "the undertaking" in sect. 4 of the *Railway Companies Act*, 1867, must mean the railway, and the receiver is to be appointed receiver of the tolls of the railway only. There is no definition of "undertaking" in this Act, but by sect. 2 of the *Lands Clauses Act*, 1845, and in the *Railway Clauses Act*, 1845, "the undertaking" means the undertaking authorized by the special Act, *i.e.*, the railway. The Act only protects the rolling stock, &c., of the railway, and this confirms the view that the receiver is to be only over the railway.

The Judge was influenced by *Great Northern Railway Company* v. *Tahourdin* (1), but there the company was constituted for the purpose of making a railway, and required compulsory powers for that purpose.

(1) 13 Q. B. D. 320.

Romer, Q.C., and *Kirby*, for the petitioning creditor :—

It has been contended that it is hard for a dock company to find itself turned into a railway company, but it is only turned into one for the purposes of the *Railway Companies Act*, 1867, which is not one to be construed narrowly, for it is an Act beneficial to the company and to the public. The definition there given of a railway company is a very wide one, and *Great Northern Railway Company* v. *Tahourdin* (1) saves the necessity of our arguing that it is not requisite for the railway to form an important part of the company's undertaking. The Act of 1865 contemplated the making of the greater part of the railway by the *Blackwall Railway Company*, but on notice being given by the *Railway Company*, which was given, the *Dock Company* became bound to make this piece of railway, and if they exercised their option to that effect, which they did, then also to work it. The Act of 1868 points out that the agreements between the companies were made by parliamentary authority, and that further statutory powers were required—it then gives the companies power to alter the agreements, and provides that nothing in the Act shall exempt the railway from the general provisions of the *Railway Acts*. Then the recitals of the Act of 1879 shew that statutory power was required to authorize further agreements between the *Dock Company* and the *Railway Company*, and such power was given. It is clear, then, that the *Dock Company* has been acting under powers given to it by Act of Parliament, and who applied for the Acts cannot make any difference. It might without any such power have made a railway on its own land for its own purposes, but apart from the Acts in question it could not have made a railway to form part of a line of through communication. The *Dock Company* is, then, constituted by Acts of Parliament for the purpose, *inter alia*, of making a railway. The expression "Act of Parliament" in the statute cannot be confined to a single Act. It means constituted by parliamentary authority for the purpose. The statute says nothing about the company being one which required parliamentary powers for compulsory purchase of land, or as to a *Wharncliffe* meeting being required. Suppose a company was authorized by one Act to make a canal, and then by a second Act to make a railway, is it not constituted by Act of Parliament for the purpose of making a railway? All things which a company is authorized by Parliament to do are part of its constitution, and it is constituted by Act of Parliament for the purpose of doing those things. Then as to what the receiver is to be appointed of.

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(1) 13 Q. B. D. 320.

[COTTON, L.J.:—We do not desire to hear you upon that.]

Latham, Q.C., *E. H. Pollard*, and *T. H. Wright*, for the *Dock Company*:—

We support the order. The company has grown up by degrees, it arises from the consolidation of two dock companies, and its powers have been extended from time to time—its construction is not defined by any one Act.

[LOPES, L.J.:—But no Act of your own gives you any authority to make a railway.]

That is true, but if a company is empowered by Act of Parliament to apply its funds for particular purposes it is constituted by Act of Parliament for those purposes. This is pithily expressed by Lord *Westbury* in *Taylor* v. *Chichester and Midhurst Railway Company* (1). The *Railway Companies Act* of 1867 does not say "constituted by its Act of Parliament," but "constituted by Act of Parliament." The agreement scheduled to the Act of 1865, and confirmed by that Act, made it obligatory on the *Dock Company* to make this piece of railway if they received notice from the *Railway Company*, they did receive it, and from that time they were a company constituted for the purpose of making a railway, and whether the Act is intituled with the name of the *Dock Company* is immaterial. The words in the 3rd section are in the disjunctive, which shews that the Legislature contemplated the case of a railway being made by one company and worked by another, which fortifies the conclusion that the constitution is to be collected from all the Acts relating to the company. Whatever a company has statutory power to do is one of its purposes: *Wilkinson* v. *Hull, &c.. Railway and Dock Company* (2).

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(1) Law Rep. 4 H. L. 628.

(2) 20 Ch. D. 323.

Whitehorne, Q.C., and *W. Ford*, for the *London, Tilbury and Southend Railway Company.*

Byrne, in reply.

COTTON, L.J.:—

This is an appeal against an order made by Mr. Justice *Chitty*, appointing a receiver and manager under the Act 30 & 31 Vict. c. 127, over the undertaking of the *East and West India Dock Company.* Two points are raised. The first is whether the Court has jurisdiction to make any such order at all. The second is whether, assuming that an order ought to have been made, the order made by Mr. Justice *Chitty* is too extensive as regards the property of which he appointed a receiver and manager.

The first question turns upon the construction of the beginning of the 3rd section of the Act. Before I go into that, let me state the facts of the case.

The *East and West India Dock Company* was formed by the amalgamation, under 1 Vict. c. ix., of two companies, both created by Act of Parliament many years ago, one for making the *West India Docks,* the other for making the *East India Docks.* Under an Act of 1865 it has made, and under and in agreement with a subsequent Act it is working as an ordinary locomotive railway, a piece of railway which is not a mere siding from the dock to the railway of the *Blackwall Railway,* but is a portion of a railway constructed as a continuation of the *London and Blackwall Railway.* It is therefore not to be treated as if it had made and was working merely a private siding for conveying its own goods to the *Blackwall Railway,* and goods coming to the dock from the *Blackwall Railway;* it has made and is working part of a public railway communicating between a point on the bank of the *Thames,* and another point on the *Blackwall Railway.* It is doing this under the authority given to it by the Act of 1865, and by the subsequent Act of 1879, which latter Act enabled it to use this as a locomotive railway, which it could not do before. Now in my opinion, but for the Act of 1865 the *Dock Company* could not have made that railway, for it was not within the purposes

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Cotton, L.J.

for which up to that time the *Dock Company* was constituted. That Act, it is true, was not introduced by the *Dock Company*, it was an Act the bill for which was introduced by the *Blackwall Railway Company*, but in my opinion that is not material, and I only mention it because it was made part of the argument. The Act of 1867 does not say that a "company" means a company constituted by its Act of Parliament for the purpose of making a railway, but constituted "by Act of Parliament." And even if the Act of 1865 was passed without the shareholders in the *Dock Company* being consulted, without there being what is called a *Wharncliffe* meeting, it was for Parliament to say whether, having regard to its rules and regulations, it would pass such an Act giving the powers here given to the *Dock Company*. That Act by sect. 59 authorized further agreements to be entered into between the *Dock Company* and the *Blackwall Railway Company*, but sect. 60 is the material one, it confirms the agreement entered into between the *Dock Company* and the *Blackwall Railway Company*, and thereby gives it the force of an Act of Parliament. That agreement provides that the *Dock Company* shall on receiving three months' notice make, within a limited time, that portion of the railway from the *Blackwall Railway* to the riverside which is on land forming part of the land of the dock, and that when that line is made it shall remain the absolute property of the *Dock Company*, subject to certain rights of user in certain events by the *Blackwall Railway Company*. Then there are provisions as to the management of the line, and there is this: "The *Dock Company* shall at their option, if they think fit, have the management of and work so much of the said line of railway as passes through or over their lands and property."

Now let us consider the 3rd section of the *Railway Companies Act*, 1867. It says that in this Act the term "company" means a railway company, and it goes on to explain what a railway company means. A great part of the argument of the Appellant would have been cut away if those words "means a railway company" had not been introduced, for a great part of their argument was "can it be supposed that Parliament intended to turn this *Dock Company* into a railway company, so as to subject the shareholders in the *Dock Company* to all the consequences of their being converted into a railway company." Undoubtedly the Act of 1865 authorized the *Dock Company* to make this piece of railway, and gave that power with all the consequences, whatever they might be, of the *Dock Company* having that power and exercising it, and amongst those consequences is this: that the railway shall be subject to all the general provisions of Acts of Parliament relating generally to railways in *England*, and not only to particular railways. Whether it thought of calling this *Dock Company* a railway company we cannot say, but the real question is whether this is a company "constituted by Act of Parliament for the purpose of constructing, maintaining, or working a railway, either alone or in conjunction with any other purpose." Those last words are material, for they shew that the term "railway company" was not intended to be confined to a company constituted only for the purpose of making a railway, and there is nothing in the Act to indicate that we ought to consider the comparative importance of the railway, and of the other portions of the works of the company. The company may also be constituted for other purposes than for a railway, the Act only requires that it shall be constituted for the purpose of constructing, maintaining, or working a railway. Now as I say, without the Act of Parliament giving the force of law to the agreement of 1865, the *Dock Company* could not have constructed, maintained, or worked that railway. Whether it is authorized to maintain it is immaterial, because clearly it was authorized to construct and work it, and whether it was authorized to maintain it is a question into which I do not enter.

Now what is the meaning of "constituted for the purpose of constructing, maintaining, or working a railway"? It was argued by Mr. *Byrne* that from the use of the word "constituted," we ought to come to the conclusion that this must be one of the fundamental purposes of the company. He admitted, however, that it was not necessary that the company should be constituted for the purpose of making a railway by its original Act of Parliament, or that there should be one Act of Parliament only. In my opinion if there is a company which depends for its constitution on Acts of Parliament, then if it has statutory powers of constructing or working a railway, it is a company constituted by Act of Parliament for the purpose of constructing or working a railway. It is very true that it is not compelled to make a railway, and, as far as I know, no railway company which has not begun making a railway is compelled to make it, except that coercion is put upon railway companies by requiring deposits of money when they apply for their Acts, which deposits are liable to be forfeited if they do not make their railway. If a company once begins to make its railway, it is a different question. If in this case the *Dock Company* had agreed with the *Blackwall Company* not to make and not to work this railway, there would be a difficulty, but it would be met in this way. There could, in that case, be no rolling stock of the company to be protected, and the Act does not require the Court to make an order, but only gives the Court power to make an order if the company is a company coming within that definition. If therefore the *Dock Company* had not made the railway, although it would still be within the definition, yet the Court if asked to make an order under this Act might say: "The company may be within the definition, but we are not compelled to make an order, and under the circumstances of the case we shall not make an order." Here the company has made the railway, and has rolling stock upon it, and in my opinion the Court has power to make an order under the 4th section.

Then is the order which has been made too large? I said in a former case, *In re Mersey Railway Company* (1), that this section deprives those who obtain judgments on certain contracts, and under certain circumstances, of the right they would otherwise have of taking the rolling stock in execution, and gives them a remedy against something quite different from that which they could have taken in execution, by enabling all the revenues of the company to be brought in and applied in payment of the judgment creditors, and possibly of all creditors. What is there to require the Court to restrict the receiver to the mere railway undertaking? It was ingeniously argued that as in the *Lands Clauses Act* and in the *Railways Clauses Act* "undertaking" means only the undertaking authorized by the special Act, therefore in the present case it must mean the undertaking

(1) 37 Ch. D. 610.

authorized by the Act of 1865 which gave the *Dock Company* power to make a railway. I find nothing to authorize us so to restrict the expression. The *Railway Companies Act*, 1867, gives no interpretation of what is meant by the "undertaking of the company," and the natural and proper interpretation appears to me to be that which the company by its constitution, and having regard to all its Acts of Parliament, is authorized to undertake and to do. In my opinion, therefore, the Judge was right in appointing a receiver and manager of the whole undertaking of this company, and the appeal altogether fails.

FRY, L.J.:—

To my mind the judgment of Mr. Justice *Chitty* in this case is very plainly right. We have a dock company authorized by the Act of 1865 to construct a railway, and by the same Act authorized to work that railway, and I think by implication also, if it be material, authorized to maintain that railway. It is quite true that the authority is not given in the usual manner in which such an authority is given to railway companies. It is given through the intervention of an agreement entered into between the *London and Blackwall Railway Company* and the *Dock Company*, but that agreement is sanctioned and made binding on both the companies by statute, and the result is that, through the intervention of that agreement, the authority is given by statute to the *Dock Company* to make and work this railway. They have a power conferred upon them which, under their previous Acts, they did not possess. Now, that being so, it appears to me to be immaterial that the obligation to make the railway is dependent upon a certain contingency, viz., three months' notice from the railway company. That contingency having happened, the authority given by the statute has become absolute.

That being the nature of the company, we have simply to consider the words of the statute of 1867, which defines the companies to which the statute applies. We have to consider whether this is "a company constituted by Act of Parliament for the purpose of constructing, maintaining, or working a railway either alone or in conjunction with any other purpose." Let me observe, in the first place, that there are, it seems to me, two possible constructions which may be put upon the words which I have read. It might have, but it has not been, urged that "constituted for the purpose" referred to the original constitution of the company only, and that the purpose must be found in the original instrument of constitution. In my judgment, no such argument could have succeeded, because the constitution of a railway company, like the constitution of a country, may go on varying from time to time. The only other construction seems to me to be this, that "constituted for the purpose" means constituted by the original Act or by any subsequent Acts which have added or given this purpose to the company. Any statute which gives a purpose to a company, whether it be the original statute or a subsequent statute, seems to me to be, for the purposes of this clause, a constituting statute. I think, therefore, that Mr. *Byrne* was quite right in not arguing that the constitution must be the original constitution of the company. Then, if it be not necessarily the original constitution, how are we to find the purposes for which the company is constituted? As far as I know, all Acts of Parliament which have constituted railway companies, and have defined their purposes, have defined their purposes by giving them powers. There may be exceptional legislation with which I am not acquainted, but, so far as I know, the only way in which the Legislature has pointed out the purposes of a railway company to be the construction and working of a railway has been by clothing that railway company with a power to construct and to work it, just as, in the present case, the Act of 1865 clothed the *Dock Company* with a power to construct and to work a railway. By so doing, the Legislature, in my judgment, constituted the *Dock Company*, for the purpose of the construction and the working of a railway.

Various objections have been taken by the Appellants. It is said that the statute in question was not promoted by the *Dock Company*. Why should it be? The Legislature has not been minded to say that the Act of Parliament which confers the power or constitutes for the purpose must be promoted by the company which is empowered. We are not at liberty to add to the description in the statute qualifications which narrow its effect. Then it has been said that the heading of the Act of Parliament shews that it was mainly concerned with the *Black-*

wall Railway and not mainly concerned with the *Dock Company.* But what of that? The Legislature has not required that the statute should be one mainly occupied with the company which is constituted. Then, again, it has been said that in this case it was not preceded by a *Wharncliffe* meeting of the shareholders, a statement of the correctness of which I am not convinced; but whether that be so or not is absolutely immaterial. A *Wharncliffe* meeting is simply required by the Standing Orders of the Houses of Parliament, with which we have nothing whatever to do. If the Legislature chose to waive all their Standing Orders, their having done so would in no respect alter the effect of the Act they passed.

Then, again, it has been said that making, working or maintaining the railway must be the primary purpose or the fundamental purpose of the company; but the statute seems to me to negative that, because it says, "either alone or in conjunction with any other purpose." And accordingly, in *Great Northern Railway Company* v. *Tahourdin* (1) it was determined that a company authorized by statute to make a railway, which was merely ancillary to its purposes as a dock company, was a railway company within the meaning of the *Railway Companies Act,* 1867. I think, therefore, that the company in this case satisfies all the requirements of the words to which I have referred. But further, the case appears to me to be within what may be called the mischief of the statute. The statute was intended to prevent the seizure of rolling stock of a railway company by persons who had obtained judgments against the company. The result of such seizure was detrimental in two ways. In the first place, it rendered it impossible, or very difficult, to carry on the working of the railway, in which the public were very largely interested, and, in the second place, it enabled a creditor to cause an irremediable injury to the company itself and to all the other creditors of the company. To prevent these evils the Legislature was minded to protect the rolling stock, and to substitute the power of appointing a receiver. Now this company, being a railway company in the sense of having a railway which it has constructed, and which is open to the public, and communicates with other railways, and having rolling stock upon that railway,

(1) 13 Q. B. D. 320.

is within the object, purview and intention of the Legislature in the Act which we are now construing. In my judgment, therefore, this company is not merely within the words but within the object, intent and meaning of the statute.

The only other point which requires attention is this. It has been suggested that the 4th section only justifies the appointment of a receiver in respect of the railway. This is not a case in which the railway forms any separate undertaking. It is part of the common undertaking of the company, and the language of the 4th section appears to me to be plain. It protects the rolling stock on the railway; it gives a power to appoint a manager of the undertaking, and it requires that due provision shall be made for the working expenses of the railway, and the other proper outgoings in respect of the undertaking. These words may be called vague, but because vague they are large and wide enough to apply to any case like the present. I think, therefore, that the order below is perfectly right.

LOPES, L.J.:—

If the language in sect. 3 of the *Railway Companies Act*, 1867, was intended to cover a case like the present, the language used is, in my opinion, most unfortunate. Why the word "constituted" was used I am at a loss to understand. However, as the rest of the Court think that the present company comes within the definition, I do not dissent, and I am very glad that this conclusion can be arrived at, because I entirely agree with Lord Justice *Fry* that the case, beyond all doubt, is within the mischief intended to be provided for by the Act. The case of the *Great Northern Railway Company* v. *Tahourdin* (1) was cited; but that case, I think, is clearly distinguishable from the present. I entirely agree with the construction put upon sect. 4 by the rest of the Court.

Solicitor for Petitioner: *Venn.*
Solicitors for Appellants: *Mackrell, Maton & Godlee.*
Solicitors for *Dock Company*: *Freshfields & Williams.*
Solicitors for *Railway Company*: *F. C. Mathews & Browne.*

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(1) 13 Q. B. D. 320.

H. C. J.

In re RAILWAY AND ELECTRIC APPLIANCES COMPANY.

KAY, J.
1888
May 29.

Deed—Patent—Assignment—Royalties—Lapse of Patent—Implied Covenant to keep up Patent—Company—Winding-up—Damages.

On the sale of a patent by the patentees to a limited company a deed of assignment was executed by the parties, by which, after a recital that the patentees had agreed to sell the patent to the company for £250 "and for the other considerations therein appearing," the patentees assigned the patent to the company absolutely: and after covenants for title by the patentees, including a covenant for quiet enjoyment of the patent "during the term subsisting therein," the company covenanted to pay to the patentees a royalty for every article "which should be manufactured or sold by the company" under the patent "while subsisting," and also a proportion of the profits arising from the manufacture or sale and from licenses granted for the manufacture or sale of articles to be manufactured under the patent "while subsisting." The deed contained no express covenant by the company to keep the patent on foot or to manufacture or sell articles under the patent. On the expiration of the first four years of the patent the company duly paid the first renewal fee under the *Patents, Designs, and Trade-marks Act*, 1883, but on the expiration of the fifth year they, through inadvertence, omitted to pay the second renewal fee within the time required by the Act and the rules thereunder, and consequently the patent lapsed. After an ineffectual attempt to obtain a private Act of Parliament to revive the patent, the company passed resolutions for a voluntary winding-up, and the patentees thereupon sent in a claim for damages for the loss, through the lapse of the patent, of the royalties reserved by the assignment, contending that a covenant to keep the patent on foot should be implied in the assignment:—

Held, that no such covenant could be implied; and that, even if it could, the patentees could not obtain more than nominal damages, the company being under no obligation, either express or implied, to manufacture the patented articles and being no longer able to carry on business.

The doctrine of implying covenants in deeds discussed.

ADJOURNED SUMMONS.

On the 11th of October, 1881, letters patent were granted to *Edward Gilbert* and *Daniel Sinclair* for a term of fourteen years for an invention "for a new and improved fastener for securing the coverings of railway and other waggons or vehicles," subject to a proviso avoiding the letters patent in default (amongst other things) of payment by the patentees of the renewal fee of £50 before the expiration of three years from the date of the letters patent.

By an indenture dated the 1st of March, 1883, and made and executed between and by Messrs. *Gilbert* and *Sinclair*, the patentees, of the one part, and the *Railway and Electric Appliances Company, Limited,* of the other part, after reciting the grant of the letters patent and the filing of the specification under them, it was recited as follows: "And whereas the said *E. Gilbert* and *D. Sinclair* have contracted and agreed with the company for the sale to them of the said invention and letters patent, and the rights, privileges, and advantages thereof, at or for the price or sum of £250 and for the other considerations herein appearing." And it was witnessed that in consideration of the premises and of the sum of £250 paid by the company, the said *E. Gilbert* and *D. Sinclair* thereby granted and assigned unto the company and their assigns the said invention and letters patent and all the privileges and advantages thereof, and the exclusive benefit thereof, and the right to take out all future prolongations and extensions of the said letters patent and any other letters patent in respect of the said invention, to hold unto the company and their assigns absolutely. Then followed a covenant by *Gilbert* and *Sinclair* with the company that the letters patent were good, valid, and effectual, and that they had full power to assign the same: "And that the said invention and letters patent and premises shall and may henceforth be lawfully held and enjoyed by the company and their assigns during the term subsisting therein:" and after the other usual covenants for title, including a covenant by the assignors to deliver over to the company all orders then in hand and all drawings and circulars relating to the invention, the company covenanted as follows: "And the company hereby covenant with the said *E. Gilbert* and *D. Sinclair,* and with each of them, that the company or their assigns will pay to the said *E. Gilbert* and *D. Sinclair,* their executors, administrators, or assigns, the sum of one halfpenny for every fastener, or other article of the like kind which shall be manufactured or sold by the company, their successors or assigns, under the said letters patent, or any such further or other letters patent or like privileges as aforesaid, whether within the countries and places aforesaid, or elsewhere, while respectively subsisting; and will make such payment for every period of three calendar months ending on the last day of the months of March, June, September, and December, within six weeks after the expiration of such period: and also in each and every year ending the 31st day of December in which the net profits of the company, or their assigns, arising from the manufacture and sale, and from licenses granted for the manufacture or sale of the articles to be manufactured under such letters patent or privileges as aforesaid while respectively subsisting, or otherwise in respect of the said letters patents and privileges while respectively subsisting," should reach a certain amount, would pay to *Gilbert* and *Sinclair* a share of the profits and of the sums received for licenses for the manufacture or sale of the patented articles. On the 4th of June, 1885, the company granted licenses to two railway companies in consideration of £200 and £250 respectively "to make and use the said invention during the unexpired residue of the term of the said letters patent." Under the provisions of the *Patents, Designs, and Trade-marks Act*, 1883, the renewal fee on patents, instead of remaining at a lump sum of £50, became payable at the option of the patentees by instalments, the first instalment, £10, being payable in the present case on the 11th of October, 1885, being the expiration of the fourth year from the date of the letters patent. Accordingly this first instalment was duly paid in September, 1885, but in consequence of the patent agents having omitted to give notice that the next payment fell due on the 11th of October, 1886, such payment was not in fact made, and the omission was not discovered until after the 11th of January, 1887, when the enlarged period of three months allowed by the Act for the payment of renewal fees expired. Subsequently an ineffectual application was made by the company to Parliament by petition for a private Act to revive the letters patent.

In November, 1887, resolutions were passed by the company for a voluntary winding-up and appointing two liquidators. In answer to the usual advertisement for creditors, Messrs. *Gilbert & Sinclair* sent in a claim for £2000 damages for alleged loss occasioned by the company having failed to pay the second renewal fee of £10 and so allowed the letters patent to become void.

This summons was then taken out by the liquidators under s. 138 of the *Companies Act*, 1862, for directions as to whether they should admit the claim either in whole or in part.

Renshaw, Q.C., and *Chadwyck Healey*, for the liquidator:—

The question is whether a covenant to keep the patent on foot should be implied in the deed of assignment, so as to render the company liable for a breach of it. We submit not. This is not the case of a simple agreement, but of a formal deed under seal containing clear and express covenants; and the balance of authority shews that in dealing with formal contracts the Court will be extremely cautious before arriving at a conclusion that the parties intended more than they expressed: *Churchward* v. *Reg.* (1); *Rhodes* v. *Forwood* (2).

[KAY, J.:—*Stirling* v. *Maitland* (3) seems to be a case against you.]

That was a case simply of construction.

[KAY, J.:—In *M'Intyre* v. *Belcher* (4), where the defendant purchased a medical practice, and agreed to pay the plaintiff a certain proportion of the earnings, but afterwards ceased to carry on the business or obtain earnings, it was held that there was an implied covenant in the agreement that he would not by his wilful acts or defaults prevent the receipt of earnings.]

That was the case of an agreement, not a deed; and the question there turned on the defendant's "wilful act or default," which was the case made by the pleadings. Here, looking at the terms of the deed, the inference is that the company were not bound to sell or manufacture the patented articles or to be put under any obligation whatever to keep up the patent. There is, no doubt, some difficulty upon the authorities; the Court having in some cases been disinclined to infer a covenant not expressed, as in *Churchward* v. *Reg.* and *Rhodes* v. *Forwood*, while in other cases they have done so readily, as in *Stirling* v. *Maitland*, *M'Intyre*

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(1) Law Rep. 1 Q. B. 173.

(2) 1 App. Cas. 256, 262.

(3) 5 B. & S. 840.

(4) 14 C. B. (N.S.) 654.

v. *Belcher* (1), and *Telegraph Despatch and Intelligence Company* v. *McLean* (2), which latter case, however, was really one of fraud, and, moreover, none of the authorities were cited in it. According to *Aspdin* v. *Austin* (3) and *Rashleigh* v. *South-Eastern Railway Company* (4), covenants may be inferred from words of recital or reference, but not where there are express covenants to perform certain acts: in that case there is no implication of covenants to do every act convenient or even necessary for the perfect performance of the express covenants. In *Iven* v. *Elwes* (5) it was held that a covenant is not to be implied in a deed unless, upon the fair construction of the deed, it appears that it was the intention of the parties that the covenant should be implied, or unless it is absolutely necessary to imply it. Here, it was left entirely to the option of the company whether they should keep the patent on foot or not. The insertion of such a covenant was, in fact, unnecessary, because it was obviously in the company's own interest that they should keep the patent on foot. Even if a covenant to keep up the patent were to be implied, no claim for damages could be maintained, there being no covenant by the company to sell or manufacture.

Horton Smith, Q.C., and *Haldane*, for Messrs. *Gilbert & Sinclair*:—

We submit that we are entitled to damages for the company having failed to keep up the patent and so deprived us of the means of earning the royalty and share of profits reserved to us by the deed of assignment. The covenant for payment of a royalty makes it necessary to infer a covenant to keep up the patent whereby the royalty is to be earned, and this view is supported by authority, especially by *Telegraph Despatch and Intelligence Company* v. *McLean* (6). It is clear from the assignment that the parties intended the patent to be carried on and worked; and the keeping up of the patent, so as to enable the royalty and share of profits to be earned, was among the "considerations" for the deed. The question in all such cases is purely one of contract, and is so treated in the cases that have been cited, and the Court will imply a covenant which is necessary for the due fulfilment of the contract. *Aspdin* v. *Austin* (1) was adversely commented on in *Emmens* v. *Elderton* (2).

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(1) 14 C. B. (N.S.) 654.

(2) Law Rep. 8 Ch. 658, 662.

(3) 5 Q. B. 671, 683.

(4) 10 C. B. 612.

(5) 3 Drew. 25, 34.

(6) Law Rep. 8 Ch. 658.

KAY, J.:—

I am asked in this case to imply in a deed a covenant which is not there, a deed which, it seems to me, is carefully and not unskilfully drawn, and the very great danger of implying such a covenant in the deed is, of course, manifest. I cannot consider, and I have no right to know, what the suggestions were which led to this deed. All I can fairly look at, and all I have a right to know, is, what were the attendant circumstances at the time when it was executed. It may very well be that the parties discussed this matter, most carefully considered it on both sides, and deliberately and with intention omitted to put in this deed such a covenant as I am asked to imply; and, of course, the danger of raising a right by an implication of that kind is a very great one, which is amply illustrated by the consideration I have just mentioned.

The facts of the case are these. Two gentlemen, *Gilbert* and *Sinclair*, were possessed of a patent which had then recently been brought out, and in respect of which there were certain yearly payments of £10 to be made in order to keep it on foot, and the omission to make one of these payments for three months would render that patent absolutely invalid. In that state of things they assign the patent to the *Railway and Electric Appliances Company, Limited*, which is now in liquidation; and the assignment was made by a deed of the 1st of March, 1883, the deed in which I am asked to imply a covenant. The covenant which I am asked to imply is a covenant to keep this patent on foot. There is no such covenant expressed in the deed: there are no words in the deed capable of being construed into such a covenant; and it is in the entire absence of any such express covenant that I am asked to add to this deed a covenant to keep up the patent.

Now, there have been a good many authorities on this subject,

(1) 5 Q. B. 671.

(2) 4 H. L. C. 624.

KAY, J.
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many of which recognise the extreme difficulty and the extreme danger of making an implication of that kind. One of the earliest of those which have been cited before me is *M'Intyre* v. *Belcher* (1). The case is thus stated in the marginal note: "By an agreement for the sale of the goodwill of a medical practice, it was stipulated that the purchaser should have delivered up to him possession of the house, and have sold to him the horse, drugs, bottles, and surgical instruments and furniture employed in the business, at the sum of £17 5*s.*: and the vendors agreed with the purchaser to pay rent and taxes up to a given day, and that they would not within ten years from the date of the agreement practise, &c., at or within ten miles of the place: and the purchaser agreed that he would, on condition of the premises, pay the vendors for and in respect of each of the successive years ending the 31st of December, 1860, 1861, 1862, and 1863, if he should be living at the end of each respective year, one fourth part of the earnings and receipts in respect of the said practice, without any deduction for expenses—provided the earnings and receipts in each year should amount to £300." The matter came on upon demurrer to the declaration, and turned entirely on a question of pleading; and the judgment of Chief Justice *Erle*, which would seem to have been brief, contains this passage (2): "The substance of that"—that is, the pleading—"is that he (the defendant) has wilfully chosen to destroy the goodwill. Is that a breach of the agreement? I think it is necessarily implied from the stipulations in the agreement that the defendant would take common and ordinary care so to carry on the business as to realize receipts. And a wilful omission so to do renders him liable to an action." Another of the learned Judges, Mr. Justice *Williams*, says: "Looking at this agreement, although it is true there is no express contract on the part of the defendant to carry on the business for the four years, I think such a contract may be fairly implied." And another of the learned Judges, Mr. Justice *Willes*, says: "The nature of the stipulated payments is such that it is necessary that the business should continue to be carried on during the four years. By wilfully incapacitating himself from doing so, the defendant clearly breaks his contract;" and the

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(1) 14 C. B. (N.S.) 654.

(2) 14 C. B. (N.S.) 663, 664.

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illustration he gives is this: "As, if I grant a man all the apples growing upon a certain tree, and I cut down the tree, I am guilty of a breach." I must say that that illustration does not quite satisfy my mind, and requires reconsideration. It seems to me that that illustration imports perfectly new considerations. I do not use the word "considerations" in the legal sense, but as meaning a perfectly new matter altogether. If a man sells the fruit of a standing tree it is not necessary to say there is an implied contract to keep the tree there; but if, after selling the fruit, having in his pocket the price which he has been paid for it, he cuts the tree down, he commits a deliberate fraud upon the person to whom he has sold the fruit of the tree; and I should suppose that this element of fraud enters more or less distinctly into all such cases as *M'Intyre* v. *Belcher* (1). Where a man contracts to make certain payments as part of the price of a thing which he has bought and then "wilfully"—the word used by three of the four Judges in that case—incapacitates himself from making those payments by destroying the thing which was to produce the money out of which the payments were to be made, he certainly commits, in the eye of a Court of Equity, and I should presume in the eye of a Court of Law also, a fraud upon the man from whom he has purchased the thing which was to produce the profit out of which he was to make these payments. But, no doubt, it was put in that case on the ground of implied contract; and the same ground has been adopted in another case which has been referred to, *Stirling* v. *Maitland* (2), where Lord Chief Justice *Cockburn* says: "I look on the law to be that, if a party enters into any arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative." And just to mention the other case on which reliance is chiefly placed, the case of the *Telegraph Despatch and Intelligence Company* v. *McLean* (3), there a news agency business was sold by the defendant to the plaintiffs for £2500, payable by instalments.

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(1) 14 C. B. (N.S.) 654.

(2) 5 B. & S. 840, 852.

(3) Law Rep. 8 Ch. 658.

The first two instalments of £500 each were payable at all events, but the payment of the other two of £750 each was contingent on the profits of the business, and in the event of the profits of the business exceeding a certain amount, the defendant was to receive certain benefits; and it was held that, as the purchase-money was to be ascertained by reference to the profits, there was an implied covenant that the business should be carried on, and that the plaintiffs had broken that implied covenant by assigning the business away to other parties between whom and the plaintiffs in the action there was no privity whatever, and against whom they could not recover.

Now, in all these cases there was the element of a wilful act on the part of the person against whom relief was sought which incapacitated him from carrying out that covenant which he had clearly entered into to make particular payments.

In the present case, the agreement which I have to deal with is by deed; and I agree with the argument that, being by deed, it ought to be all the more carefully construed; because, if it were a mere preliminary agreement which had afterwards to be carried out by being embodied in a deed, of course, one might easily assume the agreement itself would not have been prepared with the same care as the completed deed. But here I have the deed; and, as I have said already, it seems to me to be a deed very carefully and not unskilfully framed. It recites the letters patent and the filing of the specification, and then it recites that Mr. *Gilbert* and Mr. *Sinclair*, the patentees, had contracted with the company for the sale to them of the said invention and letters patent, and the rights, privileges and advantages thereof, at or for the price or sum of £250 and for the other considerations therein appearing. Now, I entirely agree that those last words are important, because they shew that the £250 was not the only consideration, and that what is subsequently contained in the deed was partly the consideration for which these letters patent were sold. Then there is an assignment of the letters patent, and all the privileges and advantages thereof, absolutely, and there is a covenant by Messrs. *Gilbert & Sinclair* that the letters patent are good and valid, and that the said letters patent shall and may thenceforth be peacefully held and enjoyed by the company and their assigns "during the term subsisting therein." I lay stress on those words purposely, because they are apt words which describe the duration of a completed period. There are various other covenants which I need not dwell upon particularly. Then comes this covenant: "And the company hereby covenant with the said *Edward Gilbert* and *Daniel Sinclair*, and with each of them, that the company or their assigns will pay to the said *E. Gilbert* and *D. Sinclair*, their executors, administrators or assigns, the sum of one halfpenny for every fastener, or other article of the like kind which shall be manufactured or sold by the company, their successors or assigns, under the said letters patent, or any such further or other letters patents or like privileges as aforesaid, whether within the countries and places aforesaid, or elsewhere, while respectively subsisting." Now, it will be observed that the phrase is altered: instead of "during the term subsisting therein," we now have the phrase, "while respectively subsisting;" and the covenant goes on; "and will make such payment for every period of three calendar months ending on the last day of the months of March, June, September and December, within six weeks after the expiration of such period; and also in each and every year ending the 31st day of December in which the net profits of the company, or their assigns, arising from the manufacture and sale, and from licenses granted for the manufacture or sale of the articles to be manufactured under such letters patent or privileges as aforesaid while respectively subsisting"—repeating the same words—should reach a certain amount—would pay to Messrs. *Gilbert & Sinclair* a share of the profits and of the sums received from licenses. I need not go further through the deed. There is an entire absence of any covenant on the part of the company to make the payments necessary to keep the patent on foot, or in any way to keep the patent on foot. There is an entire absence of any covenant on the part of the company to make anything under the patent even if they did keep it on foot; and now, the company being in liquidation, the liquidators have come here to ask the Court whether a claim on the part of Messrs. *Gilbert & Sinclair* for damages can be maintained under the following circumstances. The first of the payments which had to be made after this assignment was duly made, but the second payment, by an inadvertence, which it is obvious was a *bonâ fide* mistake, was omitted to be made, and the three months of grace allowed by the Act having expired, the patent lapsed; but the good faith of the company was shewn abundantly by this, that they actually went to the expense of trying to obtain a private Act of Parliament to remedy that omission, which, I have no doubt, had occurred by pure inadvertence. They did not succeed, and, therefore, the patent has lapsed.

Now, to say there was anything "wilful," in the sense of involving an act of bad faith on the part of the company, is impossible. There was nothing of that kind at all, and if the covenant to be implied is not wilfully to destroy the patent that would not assist the Plaintiff; but the real question in the case is, If in any such case you can imply a contract to keep the patent on foot, can that contract be implied here? Can I import into this deed a covenant to keep this patent on foot? The payments under the covenant are only to be made while the patent is subsisting. It was known to all the parties when this deed was executed that the patent could only subsist if the statutory payments were made; and that, if any of these statutory payments was not duly made, at the end of three months from the time when it ought to have been made the patent would lapse. That was one condition of the subsistence of the patent; and seeing on the face of the deed that the phrase which relates to the duration of the term is dropped when you come to the covenant as to the royalty payments the company are to make, it seems to me that the phrase was advisedly dropped, and that the company did not intend that they should be bound to keep the patent on foot. Messrs. *Gilbert & Sinclair*, believing the patent to be a valuable patent, and that the company would not neglect to keep it on foot, were quite content to leave that to be governed by the interest the company would have in keeping the patent on foot, without asking the company to enter into any contract or covenant to that effect at all. It seems to me that I should be running extreme danger of doing that which would be entirely contrary to the intention of both parties if I imported into this deed a covenant, which is not there, to keep the patent on foot. I, therefore, must decline to import such a covenant. It seems to me the patent lapsed by a mistake which did not involve bad faith, and I cannot hold the company liable because they are not now able to make those royalty payments which they might have made if the patent had been kept on foot.

I think great weight attaches to the other argument that, supposing such a covenant were to be implied, there is no obligation, expressed or implied, to manufacture the articles under this patent. What sort of damage, then, would Messrs. *Gilbert & Sinclair* establish if I did imply such a covenant? The company not being able to carry on its business, it could not manufacture the articles; so that the damages would be only nominal. Therefore, if I could imply such a covenant, I could only give nominal damages to Messrs. *Gilbert & Sinclair.*

Much the safest rule in such cases, in my opinion, to follow, when there is any reasonable doubt whether the parties did intend to enter into a covenant such as is sought to be implied here, is to look at the deed and at the circumstances under which the deed was made; and if you find that there is no such covenant in the deed, and that there has been no bad faith on the part of those against whom it is sought to imply such a covenant, the Court ought to be extremely careful how it implies such a covenant in a well-considered deed, when there are no words whatever which express that covenant in any way. Here there are no such words. Therefore, I must say that no claim of this kind can possibly be allowed.

With regard to the costs, the liquidators will have their costs out of the estate, but the claimants will have no costs.

Solicitors: *Burton, Yeates, Hart & Burton; Linklater & Co.*

G. I. F. C.

In re HYATT.
BOWLES *v.* HYATT.

[1886 H. 85.]

CHITTY, J.
1888
April 12, 13, 16.

Mortgagor and Mortgagee—Executor—Devastavit—Statute of Limitations—Trustees—Rents and Profits—Assets—Specialty Creditor— 3 & 4 *Will.* 4, c. 104 [*Revised Ed. Statutes, vol. vii., p.* 617].

Testator mortgaged freeholds, and died in May, 1867, having devised all his real and personal estate to *A.* and *B.* upon certain trusts, and having appointed them his executors. The executors without making provision for the mortgage debt, applied the whole of the personal estate in payment to simple contract creditors and beneficiaries. In 1869 *A.* died, and *C.* was appointed trustee in his place in 1871. The rents of the real estate were received by *A.* and *B.*, and by *B.* and *C.*, and after payment of the interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against *B.* and *C.*, under which accounts of the testator's personal estate received by *A.* and *B.* or by *B.* alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits against *B.* and *C.* Accounts were accordingly carried in in which *B.* and *C.* claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and further that as to such of the payments as were made by *A.* and *B.* upwards of six years prior to the action any claim on a *devastavit* was statute barred, and that as to the rents and profits they were not liable to account for them at all:—

Held, following *In re Marsden* (1) on this point and distinguishing *In re Gale* (2), that *B.* could not set up his own and *A.*'s wrongful payment by way of *devastavit* as a defence in order to claim the benefit of the *Statute of Limitations.*

That as to the rents and profits which had been received by *B.* or *B.* and *C.* jointly, that they were under 3 & 4 Will. 4, c. 104, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute.

ADJOURNED SUMMONS.

By an indenture of mortgage of the 1st of October, 1863, made between *William Hyatt* (the testator) of the one part, and the Plaintiffs of the other part, a freehold farm called *Brockhill Farm*, of some 198 acres, at *Eyford*, in the county of *Gloucester*, was conveyed to the Plaintiffs by way of mortgage to secure

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(1) 26 Ch. D. 783.

(2) 22 Ch. D. 820.

CHITTY, J.
1888
In re HYATT.
BOWLES *v.* HYATT.

£5000 and interest at £4 per cent. This indenture also contained the usual covenant by the mortgagor for himself, his heirs, executors, and administrators with the Plaintiffs for payment of principal and interest. On the 8th of May, 1867, *William Hyatt* died, having by his will dated the 4th of July, 1860, devised and bequeathed all his real and personal estate to *John Gillett* and the Defendant *Thomas Hyatt,* upon certain trusts for the benefit of his wife and children, and by which he empowered his said trustees to carry on his farming business for the benefit of his family, or to let the various leasehold and freehold farms till the youngest of his children attained twenty-one, and appointed *John Gillett* and *Thomas Hyatt* his executors. The will was proved by both the executors, but *John Gillett* alone managed the testator's farming business, and was the acting executor and trustee. The property comprised in the mortgage was believed to be amply sufficient to secure the said sum of £5000 and interest, and accordingly no other provision was made for satisfying the said mortgage debt, but the whole of the testator's personal estate and the rents of his real estate, including the residue of the rent of *Brockhill Farm,* after providing for the interest on the said mortgage, was applied by *John Gillett* in payment to simple contract creditors and to the legatees and beneficiaries, and generally in accordance with the terms of the will.

In July, 1869, *John Gillett* died. The surplus rents of the real estate were received and applied for the benefit of the testator's family by the Defendant *Thomas Hyatt* alone until March, 1871, when the Defendant *George Hyatt* was appointed trustee of the said will jointly with the Defendant *Thomas Hyatt,* and the real estate was conveyed to them. The balance of the rents after providing for the interest on the mortgage was received by the Defendants *Thomas Hyatt* and *George Hyatt* up to May, 1884, and applied by them in accordance with the trusts of the will for the benefit of the testator's family. The leasehold interest of the testator in certain farms bequeathed by his will had by this time expired, so that the surplus rent after providing for the mortgage debt was then the only income from real estate available for the widow. In May, 1884, *Brockhill Farm* became untenanted in consequence of the prevailing agricultural depression, and the interest having fallen into arrear a receiver was appointed at the instance of the Plaintiffs in March, 1885.

In January, 1886, *Brockhill Farm* having become an insufficient security for the mortgage, the Plaintiffs, on behalf of themselves and all other creditors of the estate took out an originating summons under Order LV. of the Rules of Supreme Court, 1883, against *Thomas Hyatt* and *George Hyatt* claiming accounts and administration of the testator's real and personal estate under which the usual accounts and inquiries were directed, including "an account of the testator's personal estate come to the hands of *Thomas Hyatt* the surviving executor of the will, either alone or jointly with the said *John Gillett*, deceased, or to the hands of any other person or persons by the order or for the use of the said *Thomas Hyatt* either alone or jointly with the said *John Gillett*," and an "account of the rents and profits of the testator's real estate received by the Defendant *Thomas Hyatt* either alone or jointly with the said *John Gillett*, or by the Defendants *Thomas Hyatt* and *George Hyatt*, or either of them, or by any other person or persons by the order or for the use of the said *Thomas Hyatt* alone or jointly with the said *John Gillett*, or for the use of the said *Thomas Hyatt* and *George Hyatt*, or either of them."

In obedience to this order, accounts were carried in by the Defendants shewing receipts of considerable sums of money derived from the personal estate the proceeds of the farm and rents and profits of real estate and in which they claimed credit for all payments and disbursements made to the simple contract creditors and the beneficiaries under the will. These disbursements, which amounted to between £4000 and £5000, more than covered the receipts. The Plaintiffs contended that their debt as a specialty debt had priority over all other debts and that the disbursements and payments in the account were accordingly improper and ought to be disallowed, and on the 24th of March, 1887, took out the present summons asking that the Defendant *Thomas Hyatt* might be ordered to pay into Court to the credit of the action a sum of £2000 on account of moneys received in respect of the estate of the testator either alone or jointly with the said *John Gillett*, deceased, and that the Defendants *Thomas Hyatt* and

George Hyatt and each of them might be ordered to pay into Court the sum of £2200 on account of like moneys received by them jointly.

This summons was adjourned into Court, and now came on for argument.

The Defendants contended, first, that as to such of the payments as were made by *John Gillett* and *Thomas Hyatt* jointly or by *Thomas Hyatt* alone upwards of six years before the date of the commencement of the action any claim on a *devastavit* was barred by the *Statute of Limitations*; and, secondly, that as to the rents of real estate they were not bound to account for them at all.

The exact sums mentioned in the summons were not pressed for by the Plaintiffs, and no question was raised as to the form in which the accounts had been directed or the mode in which the action had been commenced, but the above-mentioned points only were submitted to the Court in order to determine the principle on which the accounts were to be taken and thus save expense as much as possible.

Sir *Arthur Watson*, Q.C., and *H. C. Brown*, for the Plaintiffs:—

The executors here have acknowledged the mortgage-debt by paying interest; they chose to part with the assets without making provision for our debt, but they cannot set up their own wrong by way of *devastavit* as a defence in order to claim the benefit of the *Statute of Limitations*. *In re Marsden* (1), *Thorne* v. *Kerr* (2), and *In re Gale* (3) are distinguishable.

[They also referred to the same case as reported on another point (4).]

The mere fact that we, as specialty creditors, have not thought fit to require payment of our debt for eighteen years, is not such negligence as will deprive us of our right: *In re Baker* (5); *In re Hulkes* (6). An executor sued as such at common law by a creditor, though he might put in a plea of *plene administravit*, could not set up his own *devastavit* to escape payment.

(1) 26 Ch. D. 783.
(2) 2 K. & J. 54.
(3) 22 Ch. D. 820.
(4) 31 Ch. D. 196; 32 Ch. D. 571.
(5) 20 Ch. D. 230.
(6) 33 Ch. D. 552.

Then as to *George Hyatt*, the trustee who was appointed in 1871, he has received with his co-Defendant rents of the real estate, assets which have to be distributed in a due course of administration, instead of this, these assets have been paid away to other persons, though this debt was to their knowledge unpaid.

Romer, Q.C., and *Warrington*, for the Defendants:—

All the payments made by the executors or the surviving executors previously to the period of six years before the action commenced, were *devastavits*, and any claim by the Plaintiffs founded on a *devastavit* is now barred, for this *In re Gale* (1) is a distinct authority. The moment the executor parts with the assets by way of *devastavit* the remedy of the creditor becomes a personal remedy against him, which is barred after six years by the *Statute of Limitations*: *Thorne* v. *Kerr* (2). *In re Marsden* (3) is in direct conflict with *In re Gale*, and is erroneous, the basis of that decision was that executors were trustees. In *In re Baker* (4) the question of *devastavit* was not raised.

We are not liable at all for the rents and profits. As to the Defendant *George Hyatt*, he is clearly not liable; he is neither heir nor devisee. The only remedy given by 3 & 4 Will. 4, c. 104, is against the heirs and devisees. This appears from the latter part of the statute.

[*Fordham* v. *Wallis* (5), *Scott* v. *Jones* (6), and *Coope* v. *Cresswell* (7) were referred to.]

Sir *Arthur Watson*, in reply, referred to *Evans* v. *Brown* (8), and as to the Plaintiff's right to have some money paid in, relied on *Wanklyn* v. *Wilson* (9) and the *London Syndicate* v. *Lord* (10).

CHITTY, J.:—

This is a summons for payment of money into Court. It is directed, first, against the surviving executor in respect of per-

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(1) 22 Ch. D. 820.
(2) 2 K. & J. 54.
(3) 26 Ch. D. 783.
(4) 20 Ch. D. 230.
(5) 10 Hare, 217.
(6) 4 Cl. & F. 382.
(7) Law Rep. 2 Ch. 112.
(8) 5 Beav. 114.
(9) 35 Ch. D. 180.
(10) 8 Ch. D. 84.

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sonal estate, and secondly, against the same person, but in his character as devisee in trust of real estate of the deceased debtor and against his co-trustee, who was not originally a trustee but has been subsequently appointed. I have been asked on this summons to settle the principle on which the accounts directed by the order for the administration of the deceased debtor's estate should be taken. Seeing that both parties have concurred in requesting me to decide the general principle on the ground that it will be a saving of expense, I shall not raise any objection to the form of the proceeding.

Now the facts are not in dispute. The testator died in May, 1867. The Plaintiffs are mortgagees of certain real estate, and the mortgage contains a covenant for the payment of the debt. The mortgaged property has, by depreciation in the value of agricultural land, become an insufficient security, and consequently the Plaintiffs have recourse to the covenant for payment. The questions to be decided are questions between the creditors by specialty, in which the heirs were bound, on the one hand, and the surviving executor and devisee of real estate and his co-trustee on the other hand.

The order for accounts as regards the executor (whose case I deal with separately) is in the common form—an account of personal estate received by him alone or by him and a deceased executor, and under which he is to account only for what he has received solely or jointly, or for what has been received by his order or for his use. That is the common account of receipts directed against an executor solely in his character of executor. The order for the account is in no way founded upon any *devastavit*, and the order contains nothing whatever in regard to that subject.

Under this order the executor has brought in his account in which he charges himself with the receipt of considerable sums of money. On the other side of the account he proposes to discharge himself by shewing payments. In regard to all the payments which are challenged by the creditors made within six years before the date of the order or of the summons on which the order was founded, it is admitted, on the part of the Defendant, that all such of those items as are not proper to be allowed

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as between him and the specialty creditors must be struck out. The rights of the Plaintiffs as specialty creditors are not affected by the statute which was passed in 1870. The counsel for the executor, however, contend that all wrongful payments made previously to the period of six years before the summons were *devastavits*, and thereupon they argue, though there is nothing in this order or in the proceedings on which the order was framed, raising a case of *devastavit*, that the executor is entitled, on the taking of this ordinary account, to have these wrongful payments allowed to him. In other words, they contend that it is competent for an executor, when accounting under such an order as the present, first, to set up his own *devastavit*, and upon such *devastavit* to raise the defence of the *Statute of Limitations*. Such a defence strikes me as a novelty. An executor, by virtue of his office, owes certain duties to creditors, and the duties he owes are legal duties laid down in all the ordinary books on the subject. Among these are the duties of paying the creditors before the legatees, and of paying the creditors, where there is an order of priority, according to their priorities. Where an executor sued as such at common law by a creditor puts in a plea of *plene administravit*, he is not allowed to set up his own *devastavit* in order to escape payment.

The reason is plain. A man cannot take advantage of his own wrong, and consequently, when he is sued at common law in his character of executor, and only in that character, there must be disallowed to him all the payments which, in accordance with the duty which he owes to the creditors, have been wrongfully made, and there can be no *devastavit* found in his favour. The result is that at law the executor is considered to hold still in his own hands assets which he has improperly paid away or wasted.

I have made some search—I do not say an exhaustive search, because I do not think it is necessary to make one—in regard to the pleading of an executor against a creditor in a matter of this kind. Counsel have not been able to find, and I am satisfied they could not find any instance of a defence at law put forward by an executor (sued simply as executor) setting up his own *devastavit* and thereupon claiming the benefit of the *Statute of*

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Limitations. In these respects there is no difference between the liability of an executor at common law and in equity. Nor is there any difference where he is sued for a *devastavit.* If it is necessary that the demand against the executor should be framed on the principle of *devastavit,* or if the creditor going out of his way chooses to sue him in that form, there is no question that he can plead the *Statute of Limitations* against the *devastavit* so charged. The reason for this was well pointed out by Sir *William Page Wood* in the case of *Thorne* v. *Kerr* (1), and appears from all the authorities upon the subject when carefully considered. The creditor in such a case elects to treat the executor as his own debtor. If the plaintiff chooses to say, it is not the estate of the debtor that is liable, but it is you, the executor, who are personally liable, the executor being then charged with his own personal wrongdoing or tort is entitled to avail himself of the benefit of the *Statute of Limitations.* In that respect the liability of an executor is the same at common law as in equity.

The result is this defence on the part of the executor fails. First, I think it fails on the more technical ground of the form of the order; and, secondly, it fails because if there had been any attempt before the order to set up such a defence it must have been overruled. When I speak of the more technical ground for disallowing the defence I do not mean to say that an executor accounting under such an order as the present could not obtain his discharge in respect of payments, *primâ facie* wrong, where he could shew an active consent or any special equitable circumstances sufficient to disentitle the creditors to complain of such payments.

After what I have stated it is scarcely necessary to refer to the authorities. In the case of *In re Baker* (2) before the Court of Appeal the point was raised in argument by Mr. Justice *Pearson* who was then counsel. He said: "If *Wish* committed a *devastavit* as executor, it was by not converting the shares within one year from Mr. *Seaman's* death, and a claim on a *devastavit* is only a simple contract claim, and barred by the lapse of six years." Mr. *Romer* suggested that the point could not have been raised, because there was no plea or defence of the statute, but if Sir

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(1) 2 K. & J. 54.

(2) 20 Ch. D. 230, 237.

George Jessel and the other members of the Court had thought there was anything in this circumstance they would have referred to it in giving their judgment instead of passing it over in silence. In that case there was a delay of eighteen years in suing on a covenant, and Mr. Justice *Kay* thought that in the circumstances the plaintiff was not entitled to recover. The Master of the Rolls in giving his judgment says there is no distinction at law or in equity, the question being whether the statute had run as against the debt. The statute not having run against the debt the plaintiff was *primâ facie* entitled to recover, and with regard to negligence he said—and the observation appears to me to be most just—that there is no greater negligence in the creditor not suing than there is in the debtor not paying. In fact one may add that as it is the duty of the debtors' representative to pay the negligence on his part is the greater. Then, apparently dealing with the exact proposition now before me, the Master of the Rolls says the executor cannot shew he has duly administered the assets, and that it is practically an undefended case.

Then Mr. Justice *Kay* decided the point in *In re Marsden* (1). There has been delivered at the bar before me an argument to the effect that Mr. Justice *Kay's* judgment was based upon an erroneous proposition, namely, that the executor was a trustee for creditors; and therefore it was said it was in substance an erroneous decision. From the report it would appear that the learned Judge spoke of the executor as a trustee. For myself, as a matter of technical language, I should prefer not to describe an executor as a trustee for the creditor; that phraseology as appears from other authorities has not unfrequently been used, but as I can see Mr. Justice *Kay* did not intend to make his judgment depend upon any difference in the position of the executor in a Court of Equity and his position in a Court of Law, the critical observations that were made upon his judgment are not of any weight, and certainly they are of no weight as against the principle which I have endeavoured myself to enunciate. I think it is quite immaterial whether Mr. Justice *Kay* did or did not call the executor a trustee. The language I prefer myself using is that he owes a duty to the creditors both at law and in equity to administer the estate according to well-established principles.

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(1) 26 Ch. D. 783.

The result, therefore, is that I must disallow, or give general directions to disallow all the improper payments, and by those I mean—I have not gone through them—the payments to beneficiaries out of personal estate and payments to creditors who were in a lower degree than the Plaintiffs. With reference to the amount to be paid in as I have already said that can be mentioned in a few days hence.

In re Gale (1) I consider to be a case in which the demand against the executor appeared to the Vice-Chancellor to be put forward simply as founded on a *devastavit.* It is quite unnecessary to travel through the case; the Vice-Chancellor seems to me, if I may say so with respect, to have stated the law quite correctly when he expressed himself thus (2): "Upon the authorities, and also upon the well-settled rule of law, if you sue upon a *devastavit*, that is personal against the executor, and is barred by the six years." I think he there enunciated the law correctly, and whether there may not have been some slight misapplication of the law in regard to the facts of the case and the mode in which it was shaped against the executors it is quite unnecessary for me to inquire. I do not look upon this case as any authority that justifies the proposition that the executor when simply sued as such, and simply charged with what he has received and not sued, therefore, upon any *devastavit* at all can set up his own wrong and then plead the statute by way of defence founded on his own wrong.

Now I come to that part of the case which relates to real estate. In regard to the Defendant who is also executor the case is equally clear. He was devisee, and he has had the real assets in his hands or under his control, and I am sorry to say, believing or hoping that the mortgage security would turn out to be sufficient, he has misapplied the assets. It is right I should here state that there is no question in this case that the Defendants had notice of the Plaintiffs' debt when they respectively made the payments sought to be disallowed: interest on the debt was paid until within a short time of the proceedings being commenced. In regard to the Defendant *George Hyatt* the facts are these. He was duly appointed trustee, and the real estate was conveyed to him on the 1st of March, 1871, and he jointly with the other Defendant has brought in an account of the rents and profits of the real estate received since that date. The order directs an account of the rents and profits received as against both these Defendants. For the Defendants it is argued that they are not liable to account for the rents received, and for the Defendant *George Hyatt* it is argued that he is not accountable for the real estate at all; and that he ought not to have been made a party to this action. The latter argument is founded upon the statute of 3 & 4 Will. 4, c. 104. That statute for the first time made the real estate of a deceased debtor (where as in the case before me it is not charged with debts) assets to be administered in a Court of Equity for the payment of the debts of the deceased person, and as well for debts due on simple contract as by specialty. That was in form and in substance a new enactment, and it has *primâ facie* the effect of making real estate assets for payment of debts. The course of legislation before that statute can be described in a few words. At common law the heir, where there was a specialty binding the heir, was liable to an action on his ancestors' bond or other specialty. Then there came the statute of *William* and *Mary*, which avoided a devise as between the creditors and the devisee, and the course after that statute was to sue the heir as being the person bound by and named in the specialty, and the devisee because he had the land; and such actions were maintained at law. The effect of the statute was to avoid the devise as between the devisee and the creditors so far of course only as was necessary for the purpose of enabling the creditor to obtain payment of his specialty debt out of the land. Those were the lines on which the legislation proceeded up to this Act of 3 & 4 Will. 4, c. 104. I am referring to those Acts of Parliament passed a short time previously to this statute of *William* IV., such as the Act rendering the lands of a deceased trader liable for his debts. The form and the substance of the statute of *William* IV. was new. The substance was this: that the land itself was made assets. But there are some words which follow the substantive enactment, and upon these words the Defendants' counsel have founded their argument. I will read the words shortly: "the heir or heirs, devisee or devisees of the debtor shall be liable to all the same suits in equity at the suit of any such creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs, devisee or devisees was or were before the passing of this Act"—liable in respect of such freehold estates at the suit of creditors by specialty by which the heirs were bound. It is urged that this was a new enactment, and a new remedy, and that the only remedy therefore which is open to the creditor is the remedy given by the statute itself, and consequently the only persons liable to the demand founded on the statute are the heirs and the devisees, and consequently that *Hyatt*, who is neither heir nor devisee, is not liable. But the point is not new. Sir *A. Watson* cited in his reply the case of *Evans* v. *Brown* (1) which was before Lord *Langdale* in 1842, where the question was whether the lord claiming by escheat was or was not subject to the enactment; in other words, whether he could take the land of the deceased debtor which had escheated to him and hold it free of any obligation to pay the debts of the deceased. The same argument that I have heard was there advanced. After considering the statute Lord *Langdale* decided that it could not prevail. His decision proceeded on the ground that the words of the statute with reference to the persons to be sued do not control the express enactment that the real estate should be assets. That case, therefore, really covers this point, because the lord claiming by escheat is neither heir nor devisee, and stands even in a better position than the voluntary assign of the heir or devisee. He takes by virtue of his own title paramount. In a note to the case it is stated that an appeal was pending to the House of Lords, but so far as counsel were able to ascertain the appeal was not prosecuted. I mentioned in the course of the argument that the case of *Evans* v. *Brown* is referred to in *Tyler* v. *Thomas* (2), where it appears that proceedings were had on the judgment, and that some time after—in June, 1846—the real estate was sold and applied in payment of debts. I infer then that the appeal to the House of Lords was either not prosecuted or failed. The probability is it was not prosecuted.

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(1) 22 Ch. D. 820.

(2) 22 Ch. D. 824.

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(1) 5 Beav. 114.

(2) 25 Beav. 47.

Then the point was raised before Sir *James Wigram* in *Viscount Downe* v. *Morris* (1). There after considering Lord *Langdale's* judgment the Vice-Chancellor determined that he would follow it. Those two authorities are binding on me, and I think give the right interpretation to the statute. Then besides that there are some observations of Lord *Chelmsford* in *Coope* v. *Cresswell* (2), the substance of which is that if the real estate in the hands of a voluntary assign was not liable the statute could easily be defeated.

The result is that the *corpus* is assets. Then why are not the rents assets? Assets by accretion are known to the common law. The real estate is made an asset from the time of the debtor's decease, not merely the *corpus* but the fruit; the rents and profits are necessarily included. That is shewn by the constant course of the Court in administration suits. The creditor where the personal estate is insufficient obtains an account of rents either in the original judgment or on further consideration where the account is required for the purpose of enabling him to obtain payment of his debt. Of course where the *corpus* is sufficient it is unnecessary to take the account, but in the case before me there is the order for the account. The two Defendants in this case have the same difficulty to encounter here as the executor had with reference to the account of personal estate, the order makes them accountable for the rents. I should be sorry if the case turned upon a slip on the Defendant's part in allowing such an order to go against them; but I express my opinion in case it should be thought worth while to take the matter elsewhere, that even if it had not been for this account an account must have been directed against him such as is found in the order. I think no distinction could be made between receiving a part in the shape of proceeds of sale and receiving a part in the shape of profits of the estate. I have therefore expressed my opinion on the matter of principle, and the substance of it is adverse to the executor and trustees.

The case can be mentioned again in a few days by arrangement

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(1) 3 Hare, 394.

(2) Law Rep. 2 Ch. 122.

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for the purpose of seeing what would be a reasonable sum to be paid in. The object of the Plaintiffs is to have a reasonable sum secured by payment into Court.

I should add that I cannot allow a practice to grow up which would compel me to take the account in Court. I have already stated why I accede to what has been done in this case.

Solicitors: *Philpot & Son*, agents for *Morrell & Son, Oxford; Wilkins, Blyth, & Dutton.*

G. M.

CHITTY, J.
1888
April 20.

ATTORNEY-GENERAL *v.* LEONARD.

[1888 A. 502.]

Crown—Prerogative—Execution for Debt—Distress.

Where claims of the Crown and of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completely executed by actual sale.

MOTION on behalf of the Plaintiffs, Her Majesty's Commissioners of Works and Public Buildings, for an injunction to restrain the Defendants, until judgment in the action or further order, from removing, selling and otherwise disposing of any of the loose plant, goods and chattels upon the *Albert Palace* and grounds, which had been demised by Plaintiffs to the *Albert Palace Association*, and from in any manner interfering with the Commissioners in proceeding with the distress levied on their behalf for rent on the premises.

By two indentures of lease of the 18th of November, 1886, the *Albert Palace* and grounds and the adjacent ornamental grounds were separately demised by the Commissioners, on behalf of the Crown, to the *Albert Palace Association, Limited.*

By deed of the 18th of November, 1886, the *Albert Palace Association* had granted to *Allen* and *Felt*, from whom the Defendants were assignees, a rent-charge of £377 per annum payable out of the premises comprised in the lease of the *Palace.*

On the 25th March, 1888, two sums of £750 and £319 2*s.* 6*d.* were due from the association to the Crown for rent under the leases of 1886.

On the 3rd of April, 1888, a distress was levied on behalf of the Defendants, *Leonard* and others, on a portion of the property for recovery of £195 19*s.* 7*d.*, being the arrears due on the 1st of January, 1888, in respect of the rent-charge granted by the association by the deed of the 18th of November, 1886.

On the 7th of April the solicitors of the Treasury gave notice to the solicitors of the Defendants of their claim in priority for arrears of rent, and on the 9th of April levied a distress for the amount. On the 12th of April this action was commenced by the Attorney-General and Her Majesty's Commissioners of Works and Public Buildings to restrain the Defendants from proceeding to a sale under their distress, and the Plaintiffs now moved for an injunction.

F. Vaughan Hawkins, in support of the motion:—

Wherever the right of the Crown and the right of a subject with respect to the payment of a debt of equal degree come into competition the Crown's right prevails: *In re Henley & Co.* (1). This prerogative right to priority is paramount, and is not affected by the fact that the goods which are answerable to meet the claim of the Crown are already *in custodiâ legis* at the suit of a subject, so long as the property has not been taken out of the debtor by sale: *Giles* v. *Grover* (2); *Rex* v. *Wells* (3); *Rex* v. *Cotton* (4). Apart from prerogative the Crown as lessor would be entitled in priority over persons claiming by sub-demise from the lessee. He also mentioned 11 Geo. 2, c. 19 (an Act for more effectually securing the payment of rents, and preventing frauds by tenants).

G. Harris Lea, for the Defendants:—

It will not be disputed that the Crown, when it proceeds by writ of extent, which is a remedy peculiar to the Crown, see *Steph. Com.* (5), is entitled to priority over other creditors who may have

(1) 9 Ch. D. 469.

(2) 1 Cl. & F. 72.

(3) 16 East, 278, n., 282.

(4) Parker, 112.

(5) 9th Ed. vol. iii. p. 673.

already put in a distress, before there has been an "alteration of the property" by actual sale so as to divest it out of the debtor: *Rex* v. *Cotton* (1). In the cases cited, where the priority of the Crown in competition with the subject has been upheld, the Crown has availed itself of its remedy by extent in chief. But if the Crown, abandoning its own peculiar remedy, proceeds to levy execution in the ordinary way, then, we submit, the prerogative right no longer attaches, and the Crown is not entitled to take the goods out of the custody of the law in which they have been already placed by the sheriff at the suit of the subject.

[CHITTY, J., referred to *Chitty's* Prerogatives of the Crown (2).]

Then on the facts of the case the evidence shews that the Defendants have left abundant distress for satisfaction of the Crown's debt; and in the circumstances it will be inequitable to restrain the Defendants, as the balance after satisfying the Crown's distress will be claimed by the liquidator, and the Defendants will lose their right of priority.

F. V. Hawkins, in reply, was stopped.

CHITTY, J.:—

The Crown, as the landlord of the property, has put in a distress here, and it finds that part of the goods upon which its distress is to operate is already in the hands of a subject, who himself has put in a distress in respect of a rent-charge created by the lessees of the Crown. The question therefore arises between the title of the Crown and the title of a subject derived out of the Crown's lease. My judgment will not proceed upon the point which was suggested, rather than argued, on behalf of the Crown, that, apart from the prerogative, the Crown, as landlord, is entitled to priority over the Defendants as claiming only through the lessees. I shall decide the question simply on the prerogative of the Crown. I am asked to intervene by injunction for the purpose simply of protecting what is claimed on behalf of the Crown as the Crown's prerogative to priority. The subject who has levied the distress denies the prerogative that is claimed for the Crown. I pass at

(1) Parker, 112; Woodfall's Landlord and Tenant, 13th Ed., p. 443.

(2) Pages 262, 264.

once to the case of *Rex* v. *Wells* (1), which is a great authority on the subject. At p. 282 the Lord Chief Baron (*Macdonald*) says: "I take it to be an incontrovertible rule of law, that where the King's and the subject's title concur, the King's shall be preferred. The books are full of instances to that effect. A great number are cited in *Attorney-General* v. *Andrew* (2), and among them *Stringfellow's Case* (3), which is the case of an execution. But there is a multitude of other cases, which have nothing to do with executions. If 33 Hen. 8 had meant to have taken away or abridged this prerogative, it can hardly be imagined that it would have controlled the effect of it in the particular instance of an execution, and left it to operate in its full force, in the multitude of other cases to which it applies. That in the case of two executions subsisting at the same time, the Crown's and the subject's title do concur; and that this is a different case from the case of a first execution, which supposes that to exist before the other, appears to be manifest: each derives under his execution a title to be satisfied his debt out of the effects of his debtor. Both executions are in force at some one point of time before either is executed; the instant they thus concur, the King's prerogative to be preferred attaches. *Stringfellow's Case* proves that priority of *teste* and even part execution avail nothing; an imperfect and even barely inchoate title gives way to a title of the same nature in the Crown, whenever they are found to exist together. An execution executed by the subject alters the property, and there is then nothing left upon which the Crown's execution can attach; in that case the Crown's and the subject's title do not concur; but in the expressive language of *Steel*, C.B., in *Attorney-General* v. *Andrew*, the subject's title is prior to the King's, and is executed." I have read that passage to shew that the prerogative insisted upon here is not confined merely to the case of two executions, and that the argument for the Defendants, that it is so confined, cannot be maintained. The case of two executions is put merely as an illustration of the general nature of the Crown's prerogative. It was further argued for the Defendants that the prerogative exists only where the Crown has issued a writ of extent; but this argument cannot be sustained. In the passage cited the prerogative is in no way founded upon or attributed to an extent. The prerogative with regard to extents in chief, when considered, has no operation on the question at all. At Common Law the Crown might sue out an execution, and seize consecutively the body, lands, goods, and debts of a debtor; but the right to take them all at once was not, apparently, vested in the Crown at common law. "But after the statute of 33 Hen. 8, c. 39, it is plain that the sheriff was authorized to take on one writ the person, goods, lands, and debts, and that has been the constant process of execution at the suit of the Crown against its own immediate debtors" (see *Chitty's* Prerogatives of the Crown (1)). The prerogative that is there mentioned is the right to take all those things collectively on one writ; the subject must have his several writs: formerly his writ of *capias satisfaciendum*, or his writ of *elegit*, or of *fi. fa.*, and the like. That is the whole meaning of the learning on this part of the King's prerogatives. This has nothing to do with the Crown's title under an execution or under a distress coming in competition with the title of the subject under an execution or a distress. Directly those two titles concur, then the Crown's priority of title attaches, and the cases on execution which I have mentioned as being, as they are, mere illustrations of the Crown's prerogative, shew this, that the Crown's priority is not displaced until, in the language of *Macdonald*, C.B., the execution is executed: in other words, until the property in the goods is changed. The subject has in this case levied the first distress, and admittedly, at the time when the Crown issued its own distress, the property in the goods had not been changed. It is not necessary to consider the statute 11 Geo. 2, c. 19, upon which it was argued that the Crown is not bound by the provision as to impounding. I hold, therefore, that the Crown has priority, and I make the order for an injunction, merely to give effect to the Crown's prerogative and nothing more; preserving to the subject, so far as I can, the fruits of his own distress, subject, however, to the Crown's prerogative.

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(1) 16 East, 278, n.

(2) Hard. 24.

(3) Dyer, 67 b.

(1) Pages 262, 264.

Injunction with liberty to apply in the event of there being any surplus. Costs, costs in the action.

Solicitors: *Solicitors for the Treasury* (*Hare & Co.*); *Boyce & Son.*

F. G. A. W.

STEWART *v.* FLETCHER.

[1887. S. 1878]

CHITTY, J.
1888
April 27;
May 4.

Married Woman—Separate Estate—Restraint on Anticipation—Payment out —Power of Attorney.

Form of order for payment of dividends to a married woman where the trust is for payment to her separate use with a restraint on anticipation and no gift over, discussed and stated.

IN an action to restrain the trustee of a will from dealing with the trust fund to the income of which Mrs. *Stewart*, a married woman, was entitled during her life for her separate use without power of anticipation, and without any gift over in the event of an attempt to alienate the interest, an order had been made by consent, upon motion for an injunction, for a transfer of the fund into Court and for payment of the dividends to Mrs. *Stewart* for life.

The minutes of the payment schedule of this order, as handed out by the Registrar, provided for payment of the dividends to Mrs. *Stewart* for her separate use upon production of evidence that she had not anticipated or alienated.

April 27. *Fellows* mentioned the minutes to the Court, and submitted that, there being no gift over, the suggested evidence could answer no purpose, and would create useless expense.

CHITTY, J., directed the matter to stand over for inquiry as to the proper form of order, and to be mentioned again, at the same time intimating that some notice of the restraint on anticipation should in any case appear on the face of the order or payment schedule.

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May 4. *Fellows* again mentioned the case, and stated that it had been since ascertained that Mrs. *Stewart* was about to leave this country to join her husband in *India*, and that it was proposed that she should appoint an attorney to receive the dividends for her.

CHITTY, J.:—

The question is as to the form of order which should be used in directing payment of dividends to a married woman where the trust is for payment to her separate use without power of anticipation. It is quite plain that it should appear on the face of the order that she is restrained from anticipation, because such orders often come into the hands of third persons, and it might be that if the order did not disclose the restraint, such persons might treat the married woman as having full power of disposition. It is equally clear that in questions of this class, where there is no gift over, the married woman herself has no power whatever to anticipate her income and that any attempted anticipation is wholly without operation. It appears that the Registrars' practice is to draw the order in such a form as to shew all this. It is also necessary to produce evidence to the Paymaster-General before he will make payment. Some of the Registrars draw the order in such a form that this evidence may be given by persons other than the married woman herself. Here the lady is going to *India*, and it appears that it is not the practice for the Paymaster-General to draw cheques for *India*. The result therefore is, as she cannot receive the dividends herself, that if she is not able to give a power of attorney appointing some one to receive the dividends for her, she will have from time to time to appoint some attorney after the dividends have fallen due, that is to say, when the restraint has ceased. If she has to do that on every occasion much expense and delay must necessarily arise. I may say here that in my opinion, since the passing of the *Conveyancing Act*, 1881, s. 40, there is no reason why any married woman may not execute a power of attorney, although her separate property may be subject to a restraint on anticipation; but of course she could not, by executing any such power, get rid of the restraint on anticipation. The order I shall in future make in substitution for the present form in the payment schedule, or rather as an addition thereto, will be in such cases as the present (where there is a simple restraint on anticipation and no gift over) in the form as handed down.

There must be an affidavit or statutory declaration, but it need not be made by the lady herself but by her attorney. Inasmuch as evidence must be always required on each occasion of payment, certifying to the fact that the lady is alive, little or no additional expense can be occasioned by requiring the additional evidence, which of course may be embodied in one and the same affidavit or declaration.

The order as drawn up was as follows:—

Carry over Reduced Annuities (£818 9*s.* 3*d.*). Pay the dividends as they accrue during the life of *Marian Stewart* on annuities carried over until further orders. The said *Marian Stewart* being restrained from anticipating such dividends during her coverture, they are not to be paid to any attorney, except upon an affidavit or statutory declaration by such attorney that he receives them on behalf and for the use of the said *Marian Stewart*, and not of any other person to whom she has assigned or purported to assign them.

Solicitors: *Lattey & Hart.*

F. G. A. W.

NORTH, J.

1888

May 8.

In re MARSH.
MASON *v.* THORNE.

[1888 M. 692.]

General Power of Appointment—Exercise by Will—" Contrary Intention"—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

A marriage settlement made in 1840 reserved to the husband a general power of appointment by will "expressly referring to this power or the subject thereof." By his will (not referring to the power) he gave the residue of his property to trustees on certain trusts differing from those declared by the settlement in default of appointment:—

Held, that the power was exercised by the will.

In ascertaining whether a testator has shewn an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement made by himself the will only can be looked at.

Observations of Lord *St. Leonards* (*Sugden* on Powers (1)) dissented from.

SUMMONS asking the opinion of the Court whether the will of *Samuel Marsh*, deceased, had exercised a power of appointment conferred on him by a settlement dated the 30th of January, 1840.

The settlement was made in contemplation of the marriage (afterwards solemnized) of *Samuel Marsh* with *Marianne Taylor*. By it certain property was vested in trustees, upon trust to pay the income to *Samuel Marsh* during his life, and after his death to pay the income to *Marianne Taylor* during her life. And, after the death of the survivor of them, upon trust for the children or issue of the marriage as *Samuel Marsh* and *Marianne Taylor* should, as therein mentioned, by deed jointly appoint. "And for want of such joint appointment, then upon such trusts for the benefit of such child, children or issue, as aforesaid, or any of them, or for the benefit of any other person or persons whomsoever, and to and for such intents and purposes and generally in such manner and form as the said *Samuel Marsh* shall by his last will in writing, or any codicil or codicils thereto, legally executed, expressly referring to this power or the subject thereof, direct or appoint;" and, for want of any such direction or appointment, in trust for all and every the children and child of the marriage who being a son or sons should attain twenty-one, or die under that age leaving issue living at the time of his or their decease or deceases, or born in due time after, and who being a daughter or daughters should attain twenty-one or marry, and to be divided between such children, if more than one, in equal shares as tenants in common, and, if there should be but one such child, the whole to be in trust for that one child.

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(1) 8th Ed. p. 306.

There were eight children of the marriage. No son attained twenty-one or had issue. Two daughters only attained twenty-one or married—viz., *Mary Sarah*, who married the Rev. *H. J. Mason*, and *Adelaide*, who attained twenty-one and died on the 23rd of June, 1874, unmarried and intestate, in the lifetime of her father, who took out administration to her estate on the 23rd of July, 1874. *Marianne Marsh* died on the 19th of July, 1881, without having exercised the joint power of appointment. *Samuel Marsh* died on the 24th of April, 1884. By his will dated the 15th of March, 1877, he gave all the residue of his real and personal estate to his wife and *R. C. Hutchings*, their, his, and her heirs, executors, administrators, and assigns, upon the trusts therein mentioned, under which Mrs. *Mason* was entitled to the income for her life, with remainder to her children as soon as they should attain twenty-one, share and share alike as tenants in common, the children of any deceased child taking their, his, or her parent's share, with a gift over in case Mrs. *Mason* should die without leaving issue. The will contained no reference to the power of appointment in the settlement, or to the subject thereof. By a codicil, dated the 23rd of December, 1881, the testator appointed Mrs. *Mason* to be a trustee of his will in place of his wife, who had died.

The summons was taken out by Mr. and Mrs. *Mason* and three infant children of their marriage (by their father as their next friend) as Plaintiffs, against the trustees of the settlement as Defendants, asking the opinion and direction of the Court (*inter alia*) whether the will of *Samuel Marsh* had exercised the power of appointment given to him by the settlement.

At the hearing the Court directed the summons to be amended

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by making Mr. *Mason* a Defendant, and substituting another person as next friend for the infants.

Montague Shearman, for Mr. *Mason* :—

The will has not exercised the power. There is a sufficient manifestation of a "contrary intention" within the meaning of sect. 27 (1) of the *Wills Act* to exclude the operation of that section.

The settlement having been made by the testator himself, it must, for the purpose of construing his will with regard to the manifestation of intention, be read in connection with the will. Lord *St. Leonards* in his book on Powers (2), commenting on *Moss* v. *Harter* (3), says: "Where the property is settled by the testator himself upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power." And, with reference to the same case, it is said in *Jarman* on Wills (4): "Although the Act requires that, to be effectual, the intention not to execute the power shall appear *by the will*, that cannot mean to the exclusion of the instrument creating the power. The will, if it is to exercise the power, becomes part of the instrument creating the power, and both must be read together to collect the intention truly."

The *dicta* in some of the cases are conflicting: *In re Ruding's*

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(1) Sect. 27: "A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

(2) 8th Ed. p. 306.

(3) 2 Sm. & Giff. 458.

(4) 4th Ed. vol. i. p. 685.

Settlement (1); *Boyes* v. *Cook* (2); *In re Clark's Estate* (3). Here the testator has in effect said that sect. 27 shall not apply. The appointment to another set of trustees is also an indication of intention not to deal with property which was already vested in trustees.

C. Arnold White, for Mrs. *Mason* and her infant children:—

The power was exercised by the will. The settlement cannot limit the effect given by sect. 27 to the will. It is essential that the "contrary intention" should appear on the face of the will itself, and no such contrary intention is shewn here: *Airey* v. *Bower* (4); *Walker* v. *Banks* (5); *Moss* v. *Harter* (6); *Scriven* v. *Sandom* (7).

E. Ford, for the trustees.

Shearman, in reply.

NORTH, J.:—

I should have thought the case perfectly clear, but for the observations of Lord *St. Leonards* which have been referred to, and which of course deserve serious attention. The power of appointment contained in the settlement (omitting a few words at the end of it), is, I think, clearly a power to appoint by will "in any manner the testator may think proper;" I cannot conceive larger words. But then there are the words which I have omitted—"expressly referring to this power or the subject thereof." These words appear to me to be an attempt to impose a limitation on the exercise of a general power of appointment which is not consistent with the law contained in sect. 27 of the *Wills Act*; which says that a devise of the real estate, or a bequest of the personal estate of the testator, shall be construed to include any real or personal estate which he may have power to appoint in any manner he may think proper, and shall operate as an

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(1) Law Rep. 14 Eq. 266.
(2) 14 Ch. D. 53.
(3) Ibid. 422.
(4) 12 App. Cas. 263.
(5) 1 Jur. (N.S.) 606.
(6) 2 Sm. & Giff. 458.
(7) 2 J. & H. 743.

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execution of such power, "unless a contrary intention shall appear by the will." I cannot find anything in the present testator's will to indicate a "contrary intention." The only indication suggested is that he appointed the fund to other trustees. But he had a perfect right to do this, as he had an absolute power to dispose of the fund in any manner he pleased. The real question is whether those words in the settlement—"expressly referring to this power or to the subject thereof"—can limit or modify the power which the law has given to the testator. I do not see how a statutory power can be limited in that way. I do not find in the will itself any indication of an intention not to exercise the power. No doubt those observations of Lord *St. Leonards* have very great weight, but I cannot attend to them in defiance of the contrary opinion of the Court of Appeal. Of such a contrary opinion I find some indication in *Boyes* v. *Cook* (1), and it is clearly expressed in *In re Clark's Estate* (2). In the latter case Lord Justice *Cotton* said (3): "With respect to the extract that has been read from Lord *St. Leonards*' Treatise on Powers, I do not quite understand whether it is a statement of his own opinion, or merely a comment on the effect of *Moss* v. *Harter* (4). But if it is to be taken as an expression of his opinion that, in the case of a power of appointment in a settlement created by the testator himself, an indication of his intention to defeat his settlement must be shewn, that appears to me to contradict the words of the statute, and I should hesitate to act, even upon Lord *St. Leonards*' authority, against the expressed intention of the Legislature." Lord Justice *Thesiger* said that he was of the same opinion. And Lord Justice *James* added, "if Lord *St. Leonards* is to be understood as saying that the Act is to receive a different interpretation as regards a power contained in a settlement created by the testator from that which it would receive in other cases, I do not agree with his opinion." It appears to me that I am bound to act upon the opinion there expressed by the Court of Appeal, and to hold, notwithstanding the observations of Lord *St. Leonards*, that the power of appointment contained in the settlement was well exercised by the testator's will. I have not adverted to *Airey* v. *Bower* (1), because there is nothing in the judgments addressed to the exact point which I have to decide, though they recognise the authority of *Boyes* v. *Cook* (2).

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(1) 14 Ch. D. 53.
(2) Ibid. 422.
(3) 14 Ch. D. 431.
(4) 2 Sm. & Giff. 458.

Solicitors: *J. Shearman*; *Girdlestone, Peterson, & Todd.*

(1) 12 App. Cas. 263.

(2) 14 Ch. D. 53.

W. L. C.

STIRLING, J.

1888

March 1, 5, 21.

BROOKING *v.* MAUDSLAY, SON, & FIELD.

[1884 B. No. 257.]

Marine Insurance—Insurance on Freight—Unseaworthiness of Ship—Good Defence to Action on Policy—"Innocent Shippers"—Practice for Underwriters to pay—Action by Underwriters to restrain Holders from proceeding on Policy.

If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony.

THIS was an action by *Marmaduke Hart Brooking*, on behalf of himself and all other the underwriters on a policy of insurance, dated the 15th of February 1884, on machinery carried by the steamship *Elephant*, on a voyage from *London* to *Portsmouth*, against the insurers, Messrs. *Maudslay, Son, & Field*; and by the re-amended statement of claim the Plaintiff asked a declaration that the said policy was void, and that it might be delivered up to be cancelled; or, alternatively, a declaration that the policy is not binding on the Plaintiff and the others on whose behalf he sued, and that they and he were and are discharged from all liability for loss on the voyage; and an injunction restraining the Defendants from taking any proceedings on the policy.

The Defendants are engineers, carrying on business at *Lambeth*. In January, 1884, they were desirous of procuring certain machinery, which they had made for *L'Imperieuse*, one of Her Majesty's ships, to be conveyed from *London* to *Portsmouth*; and for this purpose they entered into a charterparty, dated the 8th of January, 1884, with one *Scott*, the owner of the steamship *Elephant*, whereby it was agreed that the machinery in question, which weighed about 867 tons, should be carried by that vessel from *Millwall Dock* to *Portsmouth Dockyard* in consideration of a lump sum of £600 as freight. The machinery was to be loaded, stowed, and discharged by the Defendants, and was to be carried in two voyages, if the vessel could take all, the owner having the option of making a third voyage or supplying another vessel to take the balance, if any. The vessel, loaded with 422 tons of the machinery, left *Millwall Dock* on the 28th of January, 1884, and reached *Portsmouth* in safety on the 3rd of February. On the 14th of the same month she again set sail from *Millwall Dock*, carrying the rest of the machinery, but on this occasion was lost with all hands on board.

On the 25th of January the Defendants had effected an insurance on the machinery which constituted the cargo on the second voyage to the amount of £30,000, and on the 13th of February the amount was increased to £40,000. Slips were initialled by the underwriters on those days, and the policy in question was issued in pursuance of these slips, and was dated the 15th of February, and included the whole £40,000. The risk included "risk of barges, lighters, &c., from assured premises and while waiting shipment on land or water." Upon the occurrence of the loss some of the underwriters paid, but a large majority disputed their liability. An inquiry into the circumstances attending the loss of the vessel took place in the Wreck Commissioner's Court, and the finding on that inquiry was given on the 14th of May. The Commissioner found that the *Elephant* had been sent to sea in an unseaworthy condition, and that *Scott*, the owner, and he alone, was responsible for the manner in which the ship went to sea. The Defendants, upon this, applied to the underwriters to pay, and a few did so, but a large majority still refused to pay; and on the 23rd of May the present action was brought.

The original statement of claim was delivered on the 24th of May, and alleged that, by reason of the weight of the machinery, the mode of stowage, the weight intended to be carried on the deck, and the fact that part of the machinery would be carried in the hatchway, rendering it impossible to put on the hatches, the risk was of a special and dangerous character, as the Defendants and their agents well knew or ought to have known; that they failed to communicate these facts to the Plaintiff; and (paragraph 4) that the vessel, with the machinery on board, set sail "in a grossly unseaworthy state;" and he claimed a declaration that the policy was void, and that it might be delivered up to be cancelled. The Defendants, in the first instance, met this by an application to strike out paragraph 4, relating to unseaworthiness, and upon this application an order was made giving the Plaintiff liberty to amend. The Plaintiff accordingly amended by alleging that the policy was void, "or the underwriters discharged from liability thereunder," retaining his former allegation that "the Defendants nevertheless claim and intend to make use of the same and treat it as a valid and existing contract on the part of the Plaintiff and those on whose behalf he sues," and adding a claim for the alternative declaration mentioned above. To this amended statement of claim the Defendants put in a defence in which (as also amended) they admitted that the ship was unseaworthy, but stated that the unseaworthiness was owing to her being overladen, and was not known to them until after the ship had been lost, and they wholly denied the allegations of concealment and non-communication of facts. And they further alleged that the overloading did not take place until after the slip for the policy of insurance was initialled, so that the question of overloading did not arise until after the contract was entered into; and they asserted that the policy was valid and had not been avoided; and, further, that although the vessel was unseaworthy, yet, according to the universal practice that had hitherto prevailed with all the leading underwriters at *Lloyd's*, the Plaintiff and the other underwriters of the policy were bound in honour, though not in law, to pay, but the Defendants denied that they had claimed or intended to deal with or make use of the policy as a valid existing policy, or that they had ever threatened legal proceedings. The Plaintiff then put in a reply in which he joined issue generally, but stated that he "did not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the Defendants of material facts." The Defendants objected to this pleading, and upon their motion, in July, 1886, Mr. Justice *Kay* ordered that all allegations of concealment or non-communication of material facts should be struck out as scandalous and embarrassing. The Plaintiff's claim was accordingly again amended, and the action came on for trial.

Sir *Henry James*, Q.C., *Hastings*, Q.C., *Gorell Barnes*, Q.C., and *Hurst*, for the Plaintiff:—

We admit that, as the policy attached from the moment the machinery was placed on board the barge for conveyance to the ship, it is not void, and we cannot ask for delivery up and cancellation; but under the alternative claim the Plaintiff is entitled to a declaration that he and the other underwriters on whose behalf he sues are not under any liability in respect of the policy. It is not enough for the Defendants to say that they do not intend to sue upon it. They may assign the policy, and, in case they do so, then, both by law and custom their assignee will be able to sue in his own name, and the Plaintiff and the other underwriters will be put to great disadvantage and will have to begin *de novo*, and prove the unseaworthiness of the ship, which the Defendants now admit. It would be sufficient, no doubt, if the Defendants would give an undertaking not to sue upon nor to assign the policy; but they refuse to give any such undertaking, except upon terms which the Plaintiff cannot accept. So, although there is a good defence at law to any claim founded on this policy, its existence subjects the Plaintiff to the danger of future litigation in which his defence would depend on extrinsic facts. And where there is "a legal defence to a written instrument depending on facts not appearing on the face of the instrument, the party charged on the instrument with some liability may come to a Court of Equity to get rid of it notwithstanding the legal defence, because the evidence of those extrinsic facts upon which the defence depends may not be forthcoming at all times and under all circumstances": *Hoare* v. *Bremridge* (1); *Bromley* v. *Holland* (2); *Simpson* v. *Lord Howden* (3); *Cooper* v. *Joel* (4). The doctrine will be applied where the instrument has, as in this case, become *functus officio*, and yet its existence may throw a cloud on the title of the other party or subject him to the danger of future litigation when the facts are no longer capable of complete proof or have become involved in the obscurities of time: *Flower* v. *Marten* (5); *Story's* Equity Jurisprudence (6).

(1) Law Rep. 8 Ch. 22, 26.
(2) 7 Ves. 3.
(3) 3 My & Cr. 97.
(4) 27 Beav. 313; 1 D. F. & J. 240.
(5) 2 My. & Cr. 459.
(6) 10th Ed. p. 705; 12th Ed. p. 689.

Sir *R. Webster*, A.G., *Byrne*, Q.C., and *Bray*, for the Defendants:—

This action is unfounded and without precedent, and the Plaintiff is not entitled to any relief whatever in it.

The Defendants have never threatened any legal proceedings, and as the unseaworthiness of the ship constitutes a good defence to an action at law upon the policy there is no possibility of any legal claim being made upon it. Under such circumstances the Plaintiff has brought this action not for the purpose of protecting himself from any possible legal claims, but for the purpose of getting the policy cancelled in order to strengthen his position against the moral or honourable claim which the Defendants as innocent shippers have upon him, and it was with this object that serious charges against the Defendants of concealment of material facts when the insurance was effected were at the outset introduced into the pleadings, which charges were found untenable and have been since withdrawn.

The action is, moreover, improper in form, for the Plaintiff purports to sue on behalf of all the underwriters of the policy and many of them have paid upon it.

In all the cases in which relief has been granted similar to that claimed in this case there have been either (*a*) proceedings actually taken, (*b*) proceedings threatened, or (*c*) a blot upon the plaintiff's title to property which it was necessary for him to clear away. And there is no case in which such relief has ever been granted where, as here, not only has there been neither danger nor threat, but there has been as between the parties an admission which would be an estoppel of any legal proceedings: *Lee* v. *Lancashire and Yorkshire Railway Company* (1). The answer to the suggestion that although the Defendants did not intend to sue upon the policy they might assign it to some other person who would do so, is that the policy could only be assigned subject to all existing equities. Moreover, by 31 & 32 Vict. c. 86, s. 1, it is expressly provided that where a policy of insurance on any ship, or any goods in any ship, has been assigned so as to pass the beneficial interest in such policy to any person entitled to the property thereby insured, the assignee of such policy shall be entitled to sue thereon in his own name; and the defendant in any action shall be entitled to make any defence which he would have been entitled to make if the said action had been brought in the name of the person by whom or for whose account the policy sued upon has been effected. So the admission made by the Defendants in this case would have operated by way of estoppel to any action brought by their assignees. As to the cases cited by the Plaintiff, all that Lord *Selborne* meant in *Hoare* v. *Bremridge* (1) was that the Court had jurisdiction to set aside a contract where there has been concealment and misrepresentation. In *Bromley* v. *Holland* (2) the question was as to the delivery up of an annuity deed, and the principle of the relief was the invalidity of the grant; and *Simpson* v. *Lord Howden* (3) was also a case as to the cancellation of a void instrument, so neither of those cases apply. On the other hand *Thornton* v. *Knight* (4) (where a point analogous to the present arose) and *Duncan* v. *Worrall* (5) are authorities in our favour, as also is *Cooper* v. *Joel* (6), cited on behalf of the Plaintiff, for the ground of decision in that case was that the defendants "professed to hold" the guarantee "for the purpose of suing at a future time"; and here it is pleaded that the Defendants never threatened or intended to make any use of the policy.

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(1) Law Rep. 6 Ch. 527.

As to the alternative claim, the Court will not make a declaration unless relief can follow upon it. *Rooke* v. *Lord Kensington* (7); and the new rule, Order XXV., r. 5, which is only slightly wider than sect. 50 of the *Chancery Procedure Act*, has not made any alteration enabling a plaintiff to have a declaratory judgment who is not entitled to consequential relief if he choses to ask for it. It is said that an action may be brought upon this policy when evidence obtainable now may no longer be forthcoming, but no such action could be brought except within six years, and as only two of the six are unexpired there can be no fear of losing evidence; and moreover this is not an action to perpetuate testimony.

(1) Law Rep. 8 Ch. 22.

(2) 7 Ves. 3.

(3) 3 My. & Cr. 97.

(4) 16 Sim. 509.

(5) 10 Price, 31.

(6) 27 Beav. 313; 1 D. F. & J. 240.

(7) 2 K. & J. 753.

Lastly, suppose a libellous letter to be in the hands of a third party, would the Court entertain an action to compel him to deliver it up upon the ground that he might at some future time commit the illegal act of publishing it? The Court will not make a declaration unless the plaintiff would have been entitled to an injunction, and the Court will not assume that an illegal act is in contemplation.

Hastings, in reply, referred to *Arnould* on Marine Insurance (1); *Lloyd* v. *Fleming* (2).

1888. March 21. Stirling, J. (after stating the facts of the case and reading the pleadings, continued):—

On these pleadings the action has been brought to trial. At the trial it was admitted by counsel for the Plaintiff that the policy is not void, and that judgment for cancellation cannot be given; but they insisted that they were entitled to relief in accordance with the alternative prayer in the statement of claim. The Defendants, on the other hand, admit that the unseaworthiness of the *Elephant* constitutes a good defence to any action at law on the policy; but they deny the right of the Plaintiff to the relief claimed by him or any other relief. This question formed the main subject of argument before me. A correspondence between the legal advisers of the Plaintiff and Defendants was, however, put in evidence, from which it appears that the real issue between the underwriters and the Defendants is one which is not and cannot be raised in this action. It is of this nature. It is the practice of underwriters, who may have a good defence to an action on a policy founded on the unseaworthiness of a vessel, to pay insurers who are "innocent shippers." Whatever may have been the case at first, it is not now asserted by the underwriters that the members of the Defendants' firm are personally to blame for the condition in which the vessel left for sea; but it appears to be alleged that through their servants or agents they were in some way implicated in the unseaworthiness, and the real question between them is whether Messrs. *Maudslay* are innocent shippers and entitled to the benefit of the practice

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(1) 4th Ed. p. 509.

(2) Law Rep. 7 Q. B. 299.

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to which I have referred. This issue cannot be tried in this action, nor, indeed, so far as I can see, by any legal tribunal whatever. It must be decided, if at all, by some Court of Honour to be selected by the parties interested. Most certainly it cannot be affected one way or the other by the judgment I am about to pronounce. My decision depends upon the dry and technical (though not unimportant) question whether (regard being had to the rules which govern the procedure of the Court) the Plaintiff is entitled to the relief for which he asks at the Bar.

The case stands thus: The Defendants are entitled to the benefit of a policy of insurance on which they may sue at law. The Plaintiff alleges and the Defendants admit by the pleadings that the Plaintiff has a valid defence to any action which may be brought at law on the policy. The Defendants say that they have not threatened legal proceedings, but they have declined to give an undertaking not to take any, and they abstain from stating whether it is their intention to take proceedings or not. Under these circumstances, can the underwriters bring the Defendants before a Court of Equity and obtain a declaration and injunction according to the second alternative of the statement of claim? If the policy were liable to be completely avoided, as, for example, if it had been obtained by misrepresentation, a Court of Equity would have jurisdiction to direct the delivery up and cancellation of the instrument. This is clearly shewn by the case of *Duncan* v. *Worrall* (1). On the other hand, where the policy cannot be so avoided, but there is a good legal defence to an action upon it (as, for example, deviation) a Court of Equity cannot make a decree for cancellation, see *Thornton* v. *Knight* (2), where the Vice-Chancellor in a few words draws the distinction between the two classes of cases. He says: "If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers, when they effected it, as to the seaworthiness of the ship, was false, I could have interfered; for then a case of fraud would have been made out against the insurers. But I cannot interfere on the mere ground of deviation, unless this Court has a concurrent jurisdiction with a Court of Law, in all cases in which relief is sought against instruments like the one in question. That, however, is not so; and, therefore, I shall dismiss the bill with costs." In that case, however, an action at law had been brought, and the decision does not cover the question before me—viz., whether the Court can make a declaration that the underwriters are not liable on the policy, and grant an injunction against future proceedings at law.

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(1) 10 Price, 31.

(2) 16 Sim. 509, 510.

Prior to the *Judicature Acts* a plaintiff coming into equity to restrain proceedings at law, was bound to shew some equitable ground for relief. He had not, as a rule, a right to come into a Court of Equity to restrain proceedings in a Court of Law if he had a good defence at law. If authority for this is wanted I may refer to the cases of *Hardinge* v. *Webster* (1) and *Kemp* v. *Tucker* (2). The present Plaintiff comes before the Court without alleging any case which would give a Court of Equity jurisdiction, either exclusive or concurrent with the Courts of Law. The sole ground on which he claims the relief is that, although there is a good legal defence to any claim by the Defendants against him, that defence depends on extrinsic facts, the evidence of which may not be forthcoming at all times and under all circumstances. The existence of such evidence is not alleged in the statement of claim nor proved at the trial; if it had been it would seem to me the appropriate remedy would be found in an action for the perpetuation of testimony rather than in proceedings such as the present. Upon this I may refer to two authorities from which (as it seems to me) inferences may be drawn adverse to the view of the law contended for by the Plaintiffs. In the case of *Angell* v. *Angell* (3) Sir *John Leach* lays down the law as to the cases in which the jurisdiction of Courts of Equity to perpetuate testimony is exercised. He says (4): "If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation, no such suit is entertained. But if the party who files the bill can, by no means, bring the matter in question into present judicial investigation (which may happen when his title is in remainder, or *when he is himself in possession*)

(1) 1 Dr. & Sm. 101.

(2) Law Rep. 8 Ch. 369.

(3) 1 S. & S. 83.

(4) Ibid. 89.

there Courts of Equity will entertain such a suit: for, otherwise, the only testimony which could support the plaintiff's title, might be lost by the deaths of his witnesses. Where he is himself in possession, the adverse party might purposely delay his claim with a view to that event." The general principle being that a person who is in a position to institute proceedings cannot file a bill to perpetuate testimony, it is nevertheless laid down that a party in possession may file such a bill. Obviously it did not occur to Sir *John Leach* that a person in possession of real estate, and threatened with an action of ejectment to which he had a good legal defence, might file a bill in Chancery to establish that defence and obtain an injunction to restrain proceedings at law. The other case is *Earl Spencer* v. *Peek* (1), where Lord *Romilly* decided that the pendency of a suit in equity in which the issue could be tried was an answer to a bill to perpetuate testimony. His Lordship said "The principle which is laid down in all the cases is, that if the matter to which the required testimony is alleged to relate can be immediately investigated in a Court of law, and the witnesses are resident in *England*, a demurrer will hold. . . . It is contended that this can only apply where the plaintiff in a bill for the perpetuation of testimony can himself bring an action and have the matter tried; but I apprehend that to be a mistake, and that if the matter is in the course of investigation in a suit, that removes the exact objection. It is stated by Mr. Justice *Story*, laying down the same rule, that where a right of action lies in the defendant, although the matter might be investigated in a Court of Justice, still the bill would lie; and I assent to that view of the case. What Mr. Justice *Story* means is, that where the right is in the other party to bring an action against the plaintiff who files the bill to perpetuate testimony, he may maintain such a bill if no such action is brought." It could not, therefore, have been his opinion that a person threatened with proceedings at law, to which he had a good legal defence, could bring a suit in equity to restrain them, on the ground that the evidence in support of his case might be lost. On principle it is difficult to see why the Defendants, having a claim which they may assert in a Court of Law at

(1) Law Rep. 3 Eq. 415, 420.

any time within the period fixed by the *Statute of Limitations*, should be compelled to try the issue on which the validity of that claim depends in a Court of Equity, and at another time than that which they may select as the most convenient for themselves. The authorities mainly relied on by the Plaintiff were the judgment of Lord *Eldon* in *Bromley* v. *Holland* (1), and certain passages in the judgments of Lord *Cottenham* in *Simpson* v. *Howden* (2), and of Lord *Selborne* in *Hoare* v. *Bremridge* (3). These authorities are, no doubt, of great value, but they relate to the cancellation of void or voidable instruments (as is shewn by the case of *Thornton* v. *Knight* (4), already cited), and do not necessarily apply to cases where, as here, the instrument is not void or voidable, and relief by way of cancellation cannot be given. In *Cooper* v. *Joel* (5) the defendants claimed the benefit of a guarantee, which was held by Lord *Romilly*, Master of the Rolls, to be invalid, and as the invalidity did not appear on the face of it an order was made for cancellation. The principle on which this decision was based is thus stated: "If a legal instrument has stated on the face of it the defect which makes it impossible to sue at law, this Court will not interfere; but, if a legal instrument has no defect on the face of it, but by reason of the circumstances connected with it, it would be inequitable to allow a person to proceed at law upon it, or if there be a good legal defence, not appearing on the instrument itself, which the lapse of time may cause the person chargeable upon the instrument from loss of the evidence necessary for his defence at law to be unable to make available, then this Court will interfere and order the instrument to be delivered up to be cancelled." This appears to be an authority in favour of the Plaintiff. The case, however, was brought on appeal before the Lord Chancellor, Lord *Campbell* (see *Cooper* v. *Joel* (6)), and his judgment appears to me to amount to a reversal of the decision of the Master of the Rolls, so far as it is based upon any principle applicable to the present case, and that, too, although cancellation, and not an injunction, was the remedy sought. If, in the present case, the argument on behalf

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(1) 7 Ves. 3.
(2) 3 My. & Cr. 97, 102.
(3) Law Rep. 8 Ch. 22, 26.
(4) 16 Sim. 509.
(5) 27 Beav. 317.
(6) 1 D. F. & J. 240.

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of the Plaintiff is well founded, I cannot see why any person liable to have a claim made against him at law, and having a good defence to it, may not bring the matter before a Court of Equity in the same way as the present Plaintiff does; and, indeed, the case was put as high as this by the learned counsel of the Plaintiff in the course of his reply. Such a right appears to be negatived by the words of the Lord Chancellor, Lord *Campbell*, in *Cooper* v. *Joel* (1). He said that the argument amounted to this, that a Court of Equity would interfere to restrain an action whenever the action ought not to be brought, and proceeded (2): "If that was the rule, hardly any dispute could arise upon a contract"—or, indeed, as to any other legal right "which might not be drawn into a Court of Equity." In my opinion no such rule exists. In my judgment, therefore, the claims of the plaintiff are not warranted by principle or supported by authority. I think that this action is in the nature of an experiment, and as the experiment fails, I see no reason why the costs should not follow the event.

Solicitors: *Waltons, Bubb, & Johnson; Hopgood, Foster, & Dowson.*

(1) 1 D. F. & J. 240.

(2) 1 D. F. & J. 245.

W. W. K.

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BANKRUPTCY—*"Act of Bankruptcy"—Petition—Liquidation—Composition—Adjudication—Relation back—Mortgage—Fraudulent Preference—Bankruptcy Act*, 1869, *ss.* 6, 10, 11, 92, 94, 95, 125, 126—*Bankruptcy Rules*, 1870.] Where a debtor, who has filed a petition for liquidation by arrangement or composition under sects. 125 and 126 of the Bankruptcy Act, 1869, containing a statement of his inability to pay his debts, subsequently makes a composition with his creditors under sect. 126, but is eventually adjudged bankrupt under that section, the adjudication does not relate back to the act of bankruptcy committed in the filing of the petition, unless such act of bankruptcy has occurred within six months before the presentation of the petition for "adjudication" (sects. 6, 11), or, if it is the first of several acts of bankruptcy as defined in sect. 6, unless it has been committed within twelve months before the order of adjudication (sect. 11), such act of bankruptcy being, after the expiration of those periods, no longer available for adjudication. Consequently, after the expiration of those periods, a disposition of his property by the compounding debtor by way of security to a particular creditor is not rendered void on the ground of any relation back of the title of the trustee on a subsequent adjudication under sect. 126 (See *In re McHenry, Ex parte McDermott*, W. N. 1888, p. 101).—Thus, where a debtor—who in 1879 had executed a mortgage and registered bill of sale to a creditor as securities for an existing debt and for a further sum advanced to enable him, the debtor, to prosecute an action which, if successful, would benefit his creditors as well as himself—filed, eight days afterwards, a liquidation petition, and then made a composition with his creditors under sect. 126, but, in consequence of his non-payment of the composition, was in 1886 adjudicated bankrupt under that section, it was held that the adjudication did not relate back to the filing of the petition so as to give the trustee under the adjudication a title to claim that the securities should be set aside on the ground of fraudulent preference under sect. 92:—*Quære*, whether, if there had been a relation back, the securities would not have been void as constituting a fraudulent preference.—The doctrine of relation back in the case of an adjudication under sect. 126, considered and explained. Sharp *v.* McHenry. Sharp *v.* Brown - - - - C. A. 427

2. —— *Distraint for Rent—Bankruptcy Act*, 1883, *ss.* 42, 125—*Administration—Order of Adjudication.*] Upon the construction of sects. 42 and 125 of the Bankruptcy Act, 1883, an order obtained in the Chancery Division by a creditor for administration of a deceased debtor's estate, not followed by any proceedings in bankruptcy,

BANKRUPTCY—*continued.*
is not equivalent to or included in the term "order of adjudication" (sect. 42) so as to limit the power of the landlord, or other person to whom rent is due from the deceased person's estate, to recover by distress one year's rent only accrued due prior to the date of the administration order. *In re* Fryman's Estate. Fryman *v.* Fryman [468

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BILL OF SALE—*Bills of Sale Act*, 1878, *ss.* 8, 10, *sub-s.* 2—*Bills of Sale Act Amendment Act*, 1882, *s.* 87—*Registration*—"*True Copy*"—*Blanks*—"*Occupation*" *of Grantor*—"*Consideration*"—*Contemporaneous Instrument*—*Concealment.*] A "true copy" of a bill of sale within sect. 10, sub-sect. 2, of the Bills of Sale Act, 1878, does not necessarily mean an exact copy: it is a sufficient compliance with the Act if the copy is true in all essential particulars, so that no one can be misled as to the effect of the bill of sale. Thus, where, in a "copy" of a bill of sale, filed with the registrar as required by that sub-section, the amount of the debt was duly stated in the operative part, but was, by a clerical omission, referred to in the power of sale, and also in the covenant for quiet enjoyment until default, as "the said sum of ," though the blanks did not occur in the original, it was held that the copy was a "true copy" within the meaning of the sub-section.—The object of sect. 10, sub-sect. 2, of the Bills of Sale Act, 1878, in requiring that a bill of sale shall describe the "occupation" of the grantor, as well as his residence, is to identify him: and if the description gives a true indication of his profession, business or calling in life by which he can be identified, although he may not be actively carrying on such profession, business, or calling at the date of the bill of sale, that is a sufficient compliance with the sub-section.—Thus, where a bill of sale described the grantor as a "contractor and financial agent"—a proper description of his calling in life, though, in consequence of his time and attention having been taken up by litigation with a foreign railway company to whom he had acted for some years as financial agent in this country, he had ceased, for five years prior to the date of the bill of sale, to actively carry on business—it was held that his "occupation" was sufficiently described within sect. 10, sub-sect. 2.—Under sect. 8 of the Bills of Sale Act (1878) Amendment Act, 1882, a bill of sale is void unless it "truly sets forth the consideration for which it was given"; that is to say, it must shew, on the face of it, the true agreement between the parties, and must not be dependent for its real effect upon some other instrument.—Thus, where M. agreed in writing to execute in favour of S. certain instruments, including a bill of sale, as securities for a debt, the agreement providing, amongst other things, for payment of compound interest, and M. accordingly executed a bill of sale, which did not explain the real nature or extent of the agreement, and contained only such part of it as could properly be embodied in a bill of sale, it was held that the bill of sale was void.—*Simpson* v. *Charing Cross Bank* (34 W. R. 568) followed. Sharp *v.* McHenry. Sharp *v.* Brown - - - - - C. A. 427

2. —— *Trade Machinery*—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4, 5, 7—*Mortgage of Land not mentioning Fixtures*—*Power of Sale*—*Conveyancing and Law of Property Act*, 1881, *s.* 19.] The owner of land and buildings which he used for the purposes of his business, and in which there was fixed machinery belonging to him, being "trade machinery" within the meaning of the Bills of Sale Act, 1878, mortgaged them in fee without any general words or any reference to fixtures or machinery. By the mortgage deed it was agreed that the powers in sect. 19 of the Conveyancing and Law of Property Act, 1881, should be exercisable without such notice as required by the Act. After the death of the mortgagor, his creditors insisted that this mortgage was void both as to the freehold and as to the trade machinery, under the Bills of Sale Acts, 1878 and 1882. The Vice-Chancellor of the County Palatine held it valid as to both. On appeal, the argument that it was void as to the freehold, was abandoned, on the authority of *In re Burdett* (20 Q. B. D. 310):—*Held*, that the mortgage was not an assignment of the trade machinery, since the trade machinery only passed by virtue of being affixed to the freehold, and that the deed did not, apart from the power of sale, give a power to seize or take possession of the trade machinery as chattels, since the mortgagee could only take possession of them by taking possession of the freehold:—*Held*, also, that the power of sale did not authorize the mortgagee to sell the trade machinery apart from the freehold:—*Held*, therefore, that the instrument was not a bill of sale within the meaning of the Acts, and gave a valid security on the trade machinery. *In re* Yates. Batcheldor *v.* Yates - - - - - C. A. 112

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CHARITY—*Gift to—Will—Perpetuity.*] A testatrix bequeathed £14,000 on trust to pay the income to the incumbent of the church at H. for the time being so long as he permitted the sittings to be occupied free: in case payment for sittings was ever demanded, she directed the £14,000 to fall into her residue:—*Held*, first, that the testatrix had not expressed a general intention to devote the £14,000 to charitable purposes, so that in case of failure of the trust for the benefit of the incumbent the fund would be applied *cy-près*; secondly, that the direction that the fund should fall into the residue being a direction that the fund should go as the law would otherwise carry it, did not offend the rule against perpetuities. *In re* Randell. Randell *v.* Dixon - 213

2. —— *Reparation of Sea Dykes—Manor—Grant of Woods to Copyholders by Crown as Lord—Charitable Purpose.*] By a return to a commission issued by Queen Elizabeth, who was lord of a certain manor near the sea, the Commissioners, in consideration of the copyhold tenants undertaking the repair of a sea-dyke which had up to that time been chargeable to the lord, granted to the tenants "that they shall have the woods growing in W. Wood for and towards the reparation of" a particular portion of the sea-dykes within the manor.—The surplus proceeds of the wood cut from time to time by the tenants were invested by them, and about the year 1765 they cut down the whole of W. Wood (allowing the lord to take possession of the soil), and invested the proceeds.—The sea having receded from the part of the manor protected by the sea-dyke, the copyhold tenants for the time being brought an action in 1882 for a declaration that, subject to the reparation of the sea-wall, they were absolutely entitled to the property representing the invested proceeds of the wood:—*Held*, by the Court of Appeal (Cotton, Lindley, and Lopes, L.JJ.), varying the decision of Pearson, J., that, upon the true construction of the return, the grant of the wood made by Queen Elizabeth constituted a charity or gift for charitable purposes; and a scheme was directed for the management and application of the trust property. Wilson *v.* Barnes - - - - C. A. 507

3. —— *Rights of Turbary — Commonable Lands purchased by a Railway Company—Trust for benefit of Occupiers of Cottages—Rights of Lord of Manor, Owners, and Occupiers.*] Prior to 1802 the occupiers of certain cottages were accustomed to cut turf on large tracts of commonable and waste lands of a manor. In that year an Inclosure Act was passed by which com-

CHARITY—*continued.*

missioners were empowered to allot lands in severalty to the lord and other persons interested, and to allot to the lord in trust for the occupiers of the cottages portions of the waste for a turf common, to be managed as the lord and the churchwardens and overseers should order and not to be depastured. The commissioners by their award, made in 1806, allotted to the lord of the manor, in trust for the occupiers for the time being of the cottages, 425 acres of waste for a turf common for the use of the cottagers. The commissioners also allotted to the lord and other persons interested portions of the inclosed lands in severalty in lieu of their rights and interests.—A railway company took for the purposes of their undertaking part of the land allotted as a turf common, and the purchase-money was paid into Court.—On a petition by the freeholders of the cottages for the distribution of the fund:—*Held* (affirming the decision of Stirling, J.), that the owners of the cottages had no claim on the fund: and that the lord of the manor was entitled to such part of the fund as represented the value of the soil in the land taken by the company:—And *held* (reversing the decision of Stirling, J.), that the remainder of the fund was to be held as a charitable trust for the benefit of the occupiers of the cottages.—*Goodman* v. *Mayor of Saltash* (7 App. Cas. 633) discussed. *In re* Christchurch Inclosure Act - - - **C. A. 520**

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See Joint Tenant. [286

COMPANY—*Contract by Promoter of intended Company—Evidence—Ratification—New Contract.*] J. entered into an agreement with W., who purported to act on behalf of a company about to be formed, to sell certain property to the company. The company was formed shortly afterwards with a memorandum and articles of association containing provisions for the adoption of the agreement by the directors on behalf of the company with or without modification. At meetings of the directors at which J. was present, resolutions were passed adopting the agreement, accepting an offer of J. to take payment of part of the purchase-money in debentures instead of in cash, and directing that the seal of the company should be affixed to an assignment by J. to the company of leasehold property comprised in the agreement, and to debentures to be issued to J. The assignment was executed by J. and sealed by the company; the debentures were issued to him, and the company took possession of the leaseholds and carried on their business thereon. The company was afterwards wound up, and the liquidator took from J. an assignment of other property comprised in the agreement:—*Held*, that there was evidence that a contract was entered into by the company with J. to the effect of the previous agreement as subsequently modified by the acceptance of debentures instead of cash, and that there was, therefore, at the time when the debentures were issued, an existing debt due from the company.—*In re Northumberland Avenue Hotel Company* (33 Ch. D. 16) considered and distinguished. Howard *v.* Patent Ivory Manufacturing Company. *In re* Patent Ivory Manufacturing Company - - - 156

COMPANY—*continued.*

2. —— *Directors—Borrowing Powers—Mortgage of Unpaid Capital—General Power controlled by Special Power.*] The directors of a company were authorized to mortgage all or any part of the company's "properties and rights":—*Held*, that the directors had power to mortgage the capital of the company for the time being uncalled.—*Bank of South Australia* v. *Abrahams* (Law Rep. 6 P. C. 265) distinguished. Howard *v.* Patent Ivory Manufacturing Company. *In re* Patent Ivory Manufacturing Company - - - - - - 156

3. —— *Directors—Qualification of Director—Winding-up—Contributory.*] By the articles of association of a limited company it was provided that the qualification of a director should be the holding 250 shares at least, that he might act before acquiring his qualification, but that his office should be vacated if he did not acquire it within three months after his election.—J., who had subscribed the memorandum of association for ten shares, was elected a director, accepted the office, and attended meetings of directors for more than three months from his election, but never applied for, nor had allotted to him, any other shares than his original ten. In the winding-up of the company the Vice-Warden of the Stannaries held that J. must be on the list of contributories for 250 shares:—*Held*, on appeal, that the acceptance of the office of director and the continuing to act after the time by which the qualification ought to have been acquired, did not amount to a contract by J. to take the additional shares requisite for his qualification, and that he must be upon the list for ten shares only. *In re* Wheal Buller Consols - - - - - **C. A. 42**

4. —— *Inspection of Registers of Company—Taking Copies—Action by Shareholder in the Interest of a Rival Company—Companies Clauses Act*, 1845 (8 & 9 *Vict.* c. 16), *ss.* 9, 10, 45, 63—*Companies Clauses Act*, 1863 (26 & 27 *Vict.* c. 118), *s.* 28.] The right of inspection and perusal of the register of debenture stockholders, which by sect. 28 of the Companies Clauses Act, 1863, is given to mortgagees, bondholders, debenture stockholders, shareholders and stockholders of the company, includes a right to take copies:—The fact that a person has taken his stock in a company at the instance of a rival company, and for the purpose of serving the interests of the rival company, does not disentitle him to the assistance of the Court in enforcing this statutory right:—*Forrest* v. *Manchester, Sheffield and Lincolnshire Railway Company* (4 D. F. & J. 126) *held* not to apply, inasmuch as that case proceeded on the ground that the plaintiff there purported to sue on behalf of himself and the other shareholders.—Order of Chitty, J., affirmed. Mutter *v.* Eastern and Midlands Railway Company
[**C. A. 92**

5. —— *Reduction of Capital—Confirmation by Court—"Capital lost or unrepresented by available assets"—Shares issued at a Discount—Sale of Property of Company in Voluntary Liquidation in Consideration of Shares in New Company—Companies Act*, 1862 (25 & 26 *Vict.* c. 89), *s.* 161—*Companies Act*, 1877 (40 & 41 *Vict.* c. 26), *ss.* 3, 4.] The liquidator of a company in volun-

COMPANY—*continued.*

tary liquidation entered into an agreement, under sect. 161 of the Companies Act, 1862, for the sale of its property to a new company, part of the consideration being the issue to each shareholder of the old company of one share of £1 in the new company, with 15*s.* credited as paid up thereon, in exchange for each fully paid-up share of £1 in the old company held by such shareholder, and that the remaining 5*s.* per share should be payable by the allottee at the times mentioned in the agreement. The whole of the shares in the new company, 500,000 in number, were issued to the shareholders in the old company in the manner mentioned in the agreement. Prior to their issue a contract providing for their being issued in that way was filed with the Registrar of Joint Stock Companies, under sect. 25 of the Companies Act, 1867. The company afterwards increased its capital by the creation of 500,000 more shares of £1 each, of which 50,000 were issued as fully paid up as the consideration for the purchase of other property by the company, and 240,000 were issued at a discount of 15*s.* per share, a contract being in each case filed, prior to the issue, with the Registrar of Joint Stock Companies. After this had been done the company passed a special resolution for the reduction of the capital by cancelling paid-up capital to the extent of 15*s.* per share, as having been lost or being unrepresented by unavailable assets. The company petitioned for the confirmation of the resolution by the Court. There was no evidence of any loss of capital otherwise than by reason of the issue of the shares at a discount:—*Held*, that the issue of the shares at a discount was illegal, and that the shareholders were still liable to the extent of 15*s.* per share:—*Held*, therefore, that the proposed reduction of capital could not be confirmed by the Court. *In re* NEW CHILE GOLD MINING COMPANY [475

6. —— *Shares—Issue of Shares at a Discount—Registered Contract—Companies Act,* 1862, *s.* 8 —*Companies Act,* 1867, *s.* 25.] A company limited by shares under the Act of 1862 has no power to issue shares at a discount so as to render the shareholder liable for a smaller sum than that fixed for the value of the shares by the memorandum of association; and such issue will be invalid although the contract with the shareholder under which the shares were issued has been registered under sect. 25 of the Companies Act, 1867.—*In re Plaskynaston Tube Company* (23 Ch. D. 542) and *In re Ince Hall Rolling Mills Company* (23 Ch. D. 545, n.) overruled. *In re* ALMADA AND TIRITO COMPANY - **C. A. 415**

7. —— *Shares—Pledge of Certificates—Blank Indorsement—Brokers—American Law—Mercantile Usage—Defective Title.*] The English executors of an English holder of shares in an American railroad, in order that the shares might be registered in their names so as to enable them to receive the dividends, and if necessary to sell, signed blank transfers with powers of attorney indorsed on the share certificates and gave them to their brokers in London. The brokers fraudulently deposited them with a London bank as security for advances made to themselves, and afterwards became bankrupt. According to American law the certificates were not negotiable instruments, but the rightful holder of them with the indorsed transfers signed was entitled to be registered as holder. By the practice of the railway company it was required that the signatures of executors to an indorsement should be attested by a consul, which had not been done, and without this they were not regarded on the Stock Exchange as duly indorsed, though the want of this attestation would not prevent registration if the company were satisfied otherwise of the genuineness of the signatures. There was some evidence that under the circumstances of the present case the bank would in America have been held entitled to be registered, on the ground that the executors had estopped themselves from disputing the titles of the holders of the certificates:—*Held*, by Kekewich, J., and by the Court of Appeal, that as the question whether the bank was to be deemed rightfully in possession of the certificates turned upon transactions in England it was to be decided by English and not by American law, though the consequences of being rightfully in possession of them depended on American law:—*Held*, by Kekewich, J., that the executors when they signed the certificates and gave them to the brokers enabled, and must be taken to have intended to enable, them to represent to any one whom it concerned that the executors had given the brokers authority to dispose of the shares in whatever manner was required, and that the executors were estopped from disputing the authority of the brokers to pledge the shares:—*Held*, on appeal, that as the certificates did not represent on the face of them that the person in possession of them would be entitled to the shares, and the absence of attestation by a consul made the transfer not in order, and was sufficient to put a party dealing with the brokers on inquiry, the executors were not estopped, and must be held entitled to the shares as part of their testator's estate. WILLIAMS *v.* COLONIAL BANK. WILLIAMS *v.* LONDON CHARTERED BANK OF AUSTRALIA - - - - - **C. A. 388**

8. —— *Shares or Stock—Forged Transfers—Forgery by one Executor—Statute of Limitations* (21 *Jac.* 1, *c.* 16, *s.* 3)—*Partnership—Action by Shareholder or Partner—Executors, Powers of—Transfer of Stock—Companies Clauses Act,* 1845 (8 & 9 *Vict. c.* 16), *ss.* 14, 20—*Form of Action.*] One of two executors cannot make a valid transfer of railway shares or stock registered in the names of both, under and subject to the provisions of the Companies Clauses Act, 1845.—Railway stock was registered in the names of two persons who were executors and trustees of a will. One of them sold and transferred the stock, forging the signature of the other to the transfers, which were registered by the railway company. On the forgeries being discovered by the other executor, a new trustee of the will was appointed in place of the forger, who then left this country. The two trustees informed the company of the forgeries, and applied to be registered as owners of the stock. The company refused to comply with the application, and the two trustees thereupon brought an action for replacement of the stock in their names. Some of the stock was transferred

COMPANY—*continued.*

more than six years before the action was brought:—*Held*, that the cause of action was the refusal by the company, when the forgeries were made known to them, to treat the Plaintiffs as owners of the stock, and that, therefore, time under the Statute of Limitations would not begin to run against the Plaintiffs until such refusal:—*Held*, also, that the Plaintiffs were entitled to treat the transfers as nullities, and that the company must be ordered to register the Plaintiffs as owners of the stock. Barton *v.* North Staffordshire Railway Company - - - - 458

9. —— *Shares—Transfer—Non-registration of Transfer—Inchoate Legal Title—Pre-existing Equitable Title.*] The deed of settlement under which a company was formed provided (*a*) that no person claiming to be the proprietor of any share by transfer should be treated as such unless and until he should have been registered in the register of shareholders as the proprietor of such share; (*b*) that no person should be entitled to be registered as the proprietor of any share unless and until by execution of the deed of settlement, or some deed referring thereto, he should have undertaken all the obligations of a shareholder; and (*c*) that every transfer should be effected by deed which, when executed, should be deposited or left at the office of the company.—The Plaintiff, a married woman, living apart from her husband, purchased shares in the company with moneys forming part of her separate estate, and such shares were transferred to and registered in the name of W., who held them as trustee for her for her separate use.—W., being indebted to the Defendants, as a security for his debt, deposited with them the certificates, and executed to them a transfer of the shares. The deed of transfer did not refer to the deed of settlement, and the Defendants sent it (along with the certificates) to the office of the company, for registration; but did not execute or offer to execute the deed of settlement. The company having received notice that the Plaintiff claimed the beneficial ownership of the shares, did not proceed to register the transfer.—In an action by the Plaintiff to establish her title to the shares:—*Held*, that the Defendants had neither a complete legal title to the shares, nor as between themselves and the company an unconditional right to be registered as shareholders in the place of W., and that their title being inchoate only was insufficient to defeat the pre-existing equitable title of the Plaintiff.—*Dodds* v. *Hills* (2 H. & M. 424) observed upon and distinguished. Roots *v.* Williamson - 485

10. —— *Winding-up—Distribution of Surplus Assets—Shareholder—Advances beyond Calls—Interest on Advances—Advanced Shareholders—Ordinary Shareholders.*] Where, upon the incorporation of a limited company, it is provided that a shareholder advancing in respect of any of his shares sums beyond the amount actually called and paid up shall receive interest on such advances, such advanced shareholder is entitled, in the event of the company being wound up, and there being surplus assets of the company after payment of debts, not only to be repaid the amount of his advances together with interest thereon up to the date of the commencement of the winding-up, but also further interest from that date up to the repayment of the advances.—The articles of association of a limited company, whose nominal capital was divided into £10 shares, ratified an agreement which had been entered into between the vendors and the promoters, by which it was agreed that the vendors should be paid partly in fully paid-up shares, and that the holders of vendors' shares should be entitled to dividends upon so much thereof as should be equal to the amount for the time being paid up on the ordinary shares, and also to interest at 5 per cent. per annum upon such amount of the nominal value of the vendors' shares as should be equal to the amount for the time being not called up on the ordinary shares.—The vendors' shares were duly issued as fully paid up, but on the ordinary shares £7 only per share was called and paid up. On the company subsequently going into voluntary liquidation, the assets shewed a surplus after payment of debts. Out of this surplus the liquidator returned to the holders of vendors' shares £3 per share, thus equalizing the amounts paid up on those and the ordinary shares.—The holders of vendors' shares also received out of the surplus assets, on the £3 per share so returned, interest at 5 per cent. per annum up to the date of the commencement of the winding-up.—Upon the question whether they were entitled to further interest from that date:—*Held*, that the meaning of the agreement was that the amount paid up on the vendors' shares beyond the amount paid up on the ordinary shares should be treated as an advance to the company carrying interest at 5 per cent. per annum, and that to put the "advancing" shareholders on an equality with the ordinary shareholders in dealing with the surplus assets in the winding-up the liquidator must give effect to that agreement by not only repaying the £3 per share, as capital advanced, with interest to the date of the commencement of the winding-up, but also by paying them further interest from that date up to the date of the repayment of the £3 per share; and that the remaining assets should be distributed among both classes of shareholders pari passu. *In re* Exchange Drapery Company - - 171

COMPOSITION WITH CREDITORS—Subsequent bankruptcy - - - - 427
See Bankruptcy. 1.

CONDITIONS OF SALE - - - 334
See Vendor and Purchaser.

CONFESSION OF DEFENCE—Judgment for costs - - - - - 378
See Practice. 5.

CONFLICT OF LAWS—American law—Transfer of shares - - - - 388
See Company. 1.

—— Heathen marriage—Polygamy - 220
See Husband and Wife. 2.

CONSENT—Authority of counsel - - 51
See Stannaries Court.

CONSIDERATION—Bill of sale - - 427
See Bill of Sale. 1.

—— Marriage settlement—Volunteers - 1
See Settlement.

CONTRACT—Foreign government - - 348
See Foreign Government.

—— Issue of shares at a discount - - 415
See Company. 6.

—— Time, the essence of - - - 334
See Vendor and Purchaser.

CONTRIBUTORY - - - - 42
See Company. 3.

COPYRIGHT—*Right to Name of Newspaper.*] The Plaintiffs, on the 3rd of February, 1888, published the first number of a newspaper, and registered it at Stationers' Hall on the next day. No advertisement had been issued that a newspaper under that name was about to be published. On the 6th of February the Defendants published the first number of a newspaper with the same name. Very few copies of the Plaintiffs' paper had then been sold:—*Held* (affirming the decision of North, J.), that the Plaintiffs could not restrain the Defendants from publishing their newspaper under that name, for that the registration at Stationers' Hall gave the Plaintiffs no exclusive right to the name, and that a title to it by user and reputation could not be acquired by a publication for three days with a very small sale. Licensed Victuallers' Newspaper Company *v.* Bingham - - - - C. A. 139

COSTS—Fees to counsel - - - 25
See Practice. 3.

—— Judgment for - - - - 378
See Practice. 5.

—— Motion—Dismissal of action - - 385
See Practice. 4.

—— Security for—Appeal—Executor - 108
See Practice. 10.

—— Security for—Next friend—Married woman
See Practice. 11. [317

—— Security for—Stannaries Court - 51
See Stannaries Court.

COUNSEL—Authority to consent - - 51
See Stannaries Court.

—— Fees - - - - - - 25
See Practice. 3.

COVENANT—Implied—Deed of assignment of patent - - - - 597
See Patent. 1.

CROWN—*Prerogative — Debtor to Crown—Priority.*] Letter-receivers were in the habit, with the sanction of the Postmaster-General, of paying moneys received on account of the Post-office into a bank to their private account, together with their own moneys, and of drawing cheques both for their own purposes and for payment to the Post-office. The bank had notice that their customers were letter-receivers, and drew cheques for Post-office purposes. The bank having gone into liquidation:—*Held*, that the Postmaster-General, on behalf of the Crown, was entitled to payment in priority over other creditors of the bank of the balance due upon the letter-receivers' accounts in respect of Post-office moneys.—*Rex* v. *Ward* (2 Ex. 301, n.) followed. *In re* West London Commercial Bank - - - - 364

2. —— *Prerogative—Debtor to Crown—Execution for Debt—Distress—Priority.*] Where claims of the Crown and of a subject as creditors come into competition, the prerogative right of the Crown to priority is not limited to proceedings by writ of extent, but equally attaches in proceedings by distress, although the distress put in by the Crown be subsequent in date to that of the subject, provided the distress put in by the subject has not been completely executed by actual sale. Attorney-General *v.* Leonard - 622

—— Grant by—Repair of sea-wall - 507
See Charity. 2.

CUSTOM OF TRADE—Transfer of shares—Blank indorsement - - - - 388
See Company. 7.

CY-PRÈS—Gift to charity - - - 213
See Charity. 1.

DAMAGES—*Agreement to enter into Agreement with Third Party.*] An agreement was made between F. and W. that W. would enter into an agreement with F.'s landlord, O., for a lease at a given rent for such term and subject to such covenants as O. should approve, and that F. upon such lease being granted would surrender his lease. W. refused to carry out this agreement:—*Held* (affirming the decision of Kekewich, J.), that F. was entitled to damages from W. for breach of the agreement. Foster *v.* Wheeler [C. A. 130

—— Covenant to keep up patent - - 597
See Patent. 1.

DEVASTAVIT—Defence of Statute of Limitations
See Limitations, Statute of. 2. [609

DIRECTOR—Authority of - - - 156
See Company. 2.

—— Qualification of - - - - 42
See Company. 3.

DISCLAIMER—Patent - - - 38
See Patent. 2.

DISCOVERY—Particulars of demand - 110
See Practice. 7.

—— Patent - - - - - 325
See Patent. 3.

—— Production of documents - - 370
See Practice. 9.

DISCRETION—Court—Order for administration
See Practice. 1. [319

—— Court—Striking out pleadings — 263
See Practice. 13.

DISTRESS — Bankruptcy — Administration of estate in Chancery Division - 468
See Bankruptcy. 2.

—— Prerogative of Crown - - - 622
See Crown. 2.

DOCK—Connected with railway - - 576
See Railway Company.

DOCUMENTS—Production of - - 370
See Practice. 9.

EASEMENT—Light - - - - 295
See Light.

EVIDENCE—Shorthand notes—Judge's notes
See Practice. 2. [332

EXECUTION—Priority—Prerogative of Crown
See Crown. 2. [622

EXECUTOR—*Admission of Assets—Payment de bonis propriis—Right of Creditor to call on Legatee to refund.*] If, in an action against executors for a legacy, the executors admit assets and judgment is given for payment of the legacy de bonis propriis:—*Quære*, whether an unpaid creditor can call upon the legatee to refund the legacy.—*Semble*, the creditor could recover the legacy in such a case if it was in fact paid out of the testator's assets, but not if it was paid by the executors de bonis propriis. *In re* Brogden. Billing *v.* Brogden - - - - - **C. A. 546**

—— Devastavit—Statute of Limitations - **609**
See Limitations, Statute of. 2.

—— Security for costs—Appeal - - **108**
See Practice. 10.

—— Transfer of shares—Forgery by one executor
See Company. 8. [458

FEES—Refreshers—Taxation - - **25**
See Practice. 3.

FIXTURES—Trade machinery - - **112**
See Bill of Sale. 2.

FORECLOSURE - - - - **197**
See Mortgage. 2.

—— Reversion—Statute of Limitations - **480**
See Limitations, Statute of. 1.

FOREIGN GOVERNMENT—*International Law—Contract—De facto Government—Rebel State—De jure Government — Confiscation — Repudiation — Rights of Third Parties.*] Where the revolutionary or de facto Government of a country has been recognised by the Government of a foreign State, a subject of such foreign State may safely contract with that de facto Government; and if, by subsequent revolution, the previously existing Government of the country is restored, the restored Government is bound by international law to treat any such contract as valid, and in a litigation with the foreigner, party to the contract, must adopt the contract, merely taking such rights as the de facto Government might have had under it.—*Semble*, that even in the case of a contract by a foreigner with a rebel State which has not been internationally recognised, property acquired under it cannot be recovered from him in violation of the contract. Republic of Peru *v.* Dreyfus Brothers & Co. - — - **348**

FORGERY—Transfer of shares - - **458**
See Company. 8.

FRAUD — Policy of marine insurance — Good defence to action - - - **636**
See Insurance—Marine.

FRAUDULENT PREFERENCE — Composition with creditors - - - **427**
See Bankruptcy. 1.

GARNISHEE ORDER—PRIORITY - **238**
See Partnership.

GOVERNMENT—De facto and de jure - **348**
See Foreign Government.

HEATHEN COUNTRY—Marriage in—Polygamy
See Husband and Wife. 2. [220

HIGHWAY—Dedication of—Pleading—Particulars - - - - - **410**
See Practice. 8.

HUSBAND AND WIFE—*Judicial Separation—Property subsequently acquired—Restraint on Anticipation—20 & 21 Vict. c. 85, s. 25.*] A wife who has obtained a decree for judicial separation is to be considered as a feme sole with respect to such property only as she may acquire or which may come to or devolve upon her after the decree: the 25th section of the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), not applying to property to which the wife was entitled in possession at the date of the decree.—*Cooke* v. *Fuller* (26 Beav. 99) distinguished. Waite *v.* Morland - - - - **C. A. 135**

2. —— *Marriage—English Domicil—Marriage in Bechuanaland according to the Customs of a Native Tribe — Polygamy — Marriage not in a Christian, but a Baralong sense, invalid.*] A union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman to the exclusion of all others."—C. B., whose domicil was English, in 1878 went to South Africa, and afterwards resided at Mafeking in Bechuanaland. In 1883 he went through the ceremony of marriage with T., a woman of the Baralong tribe, according to the customs of the tribe, among whom polygamy is allowed. C. B. and T. lived together as husband and wife. He was killed in the colony in 1884, and about ten days after his death T. gave birth to a female child. C. B. in a document which he wrote and signed in 1883, made some provision for T. and for a child out of the proceeds of sale of his property in the colony. He refused to be married to T. in a church on the ground that he was a Baralong. He never mentioned the marriage to any of his friends in England, and there was no evidence that he ever introduced or spoke of T. as his wife, but that he called her "that girl of mine." He was in receipt of about £600 a year, the rents of estates in England, devised to him for life with remainder to his lawful child or children:—*Held*, that the union of C. B. and T. was not a marriage in the Christian; but in the Baralong sense, and that it was not a valid marriage according to the law of England. *In re* Bethell. Bethell *v.* Hildyard - - - **220**

3. —— *Separate Estate—Restraint on Anticipation—Payment out—Power of Attorney.*] Form of order for payment of dividends to a married woman where the trust is for payment to her separate use with a restraint on anticipation and no gift over, discussed and stated. Stewart *v.* Fletcher - - - - - **627**

4. —— *Separate Estate — Property acquired since the 1st of January, 1883—Effect of Prior Settlement—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 5, 19.*] The effect of sect. 19 of the Married Women's Property Act,

HUSBAND AND WIFE—*continued.*
1882, is so to modify the operation of sect. 5, that the persons interested under a settlement of the property of a married woman are not by sect. 5 deprived of any benefit to which they would have been entitled under the settlement in case sect. 5 had not been enacted.—An ante-nuptial settlement executed in 1870, contained a covenant by the husband with the trustees that he would settle, or concur with the wife in settling, any property which during the coverture should come to her or to him in her right. The settlement did not contain any such covenant by the wife, or any joint agreement or declaration to that effect. In 1883, on the death of the wife's mother, the wife became entitled under her will to a share of the mother's personal estate, which was not limited by the will to the separate use of the wife:—*Held* (affirming the decision of North. J.), that this share was, notwithstanding the Act of 1882, bound by the covenant in the settlement.—*In re Queade's Trusts* (33 W. R. 816) disapproved. Hancock *v.* Hancock - - - - - C. A. 78

—— Chose in action—Severance of joint tenancy
See Joint Tenant. [286

IMPLICATION—Covenant to keep up patent 597
See Patent. 1.

—— Grant of light - - - - 295
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IMPROVEMENT OF SETTLED ESTATE - 20
See Settled Land Act. 2.

INCLOSURE—Commonable lands—Right of turbary - - - - - 526
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INDORSEMENT—Shares—Blank indorsement
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INFANT—Settlement - - - 202
See Power. 2.

INJUNCTION—Service out of jurisdiction - 330
See Practice. 12.

INSPECTION OF REGISTER - - 92
See Company. 4.

INSURANCE—MARINE—*Insurance on Freight—Unseaworthiness of Ship—Good Defence to Action on Policy—"Innocent Shippers"—Practice for Underwriters to pay—Action by Underwriters to restrain Holders from proceeding on Policy.*] If a policy is liable to be completely avoided, as on the ground of fraud or misrepresentation, a Court of Equity has jurisdiction to direct its delivery up and cancellation, but it has no jurisdiction to direct the cancellation of a policy to any claim on which there is a good legal defence, or to declare that there is no liability upon it. If there is danger of the evidence for the defence being lost, the remedy is, not an action for cancellation, but an action to perpetuate testimony. Brooking *v.* Maudslay, Son, & Field - - - 636

INTERNATIONAL LAW - - - 348
See Foreign Government.

JUDICIAL SEPARATION—Property subsequently acquired - - - - 135
See Husband and Wife. 1.

JOINT TENANT—*Severance—Marriage—Wife's Chose in Action.*] Marriage does not operate as a severance of the wife's joint tenancy in a chose in action (Bank stock) which has not been reduced into possession by the husband.—*Baillie* v. *Treharne* (17 Ch. D. 388) disapproved. *In re* Butler's Trusts. Hughes *v.* Anderson - - 286

JURISDICTION—Originating summons - 210
See Practice. 6.

LANDS IMPROVEMENT COMPANY—*River Company—Restricted Power of borrowing—Invalid Charge—14 & 15 Vict. c. lxxxvii., s. 24—16 & 17 Vict. c. cliv., ss. 4, 32, 46, 53.*] The River Dee Company was by Act of Parliament empowered to borrow upon mortgage of the lands of the company sums not exceeding £25,000. The company, however, borrowed more. After this the Lands Improvement Company, having by its Acts power to advance to landowners money for the improvement of land, advanced to the River Dee Company £6405, and by an order the Inclosure Commissioners purported to charge the lands of the River Dee Company with the repayment of that sum and interest by annual instalments:—*Held* (affirming the decision of Kekewich, J.), that the powers given by the Lands Improvement Company's Acts did not override the restriction on the borrowing powers of the River Dee Company, and that the charge on the lands of the River Dee Company was consequently invalid.—*Held*, also, that a clause in one of the Lands Improvement Company's Acts making the certificate of the Inclosure Commissioners conclusive evidence of the validity of a charge under the Act did not render the charge valid in such a case. Baroness Wenlock *v.* River Dee Company - C. A. 534

LEASEHOLD—Mortgage—Settled Land Act—Payment out of purchase-money - 383
See Settled Land Act. 1.

LEGACY—Ademption—Satisfaction - 373
See Will. 4.

—— Payment by executor de bonis propriis 546
See Executor.

LIGHT—*Implied Grant—Derogation—Building Scheme—Intervening Strip of Land—Obstruction—Injunction.*] The maxim that a grantor shall not derogate does not entitle a grantee of a house to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee.—The corporation of a town granted a lease to the Plaintiffs of a piece of land, and a newly erected building "with the rights members, and appurtenants to the said premises belonging." The building abutted on a passage twenty feet wide, which the corporation agreed to keep open, and on the other side of the passage were old buildings about twenty-five feet high. The corporation demised the land on the other side of the passage to the Defendant, who erected on the site of the old buildings a house eighty feet high, which materially interfered with the Plaintiffs' light. The land on both sides of the passage was part of a larger piece of land laid out by the corporation under a building scheme for the improvement of the town:—*Held* (affirming the

LIGHT—*continued.*

decision of Kekewich, J.), that there was no grant, express or implied, in the lease to the Plaintiffs of a right to uninterrupted light to the new building:—That the obligation on the corporation not to obstruct the Plaintiffs' light which was to be implied from the relation in which they had placed themselves to the Plaintiffs by granting them the lease, must be measured by the circumstances existing at the date of the lease and known to both parties;—That having regard to the fact that the Plaintiffs knew that the land was being laid out for building, and that they had stipulated that there should be a passage twenty feet wide adjoining the new building, they had no right to complain of the obstruction caused by the Defendant's house, and an injunction was refused.—Whether they would not have been entitled to an injunction if their light had been entirely destroyed, *quære.*—The rule, that a man who grants a house with lights cannot erect new buildings so as to obstruct those lights, applies to the case where the grantor purposely leaves a strip of land intervening between the house and the lands retained. Birmingham, Dudley and District Banking Company *v.* Ross - - **C. A.** 295

LIMITATIONS, STATUTE OF—*Mortgage—Equitable Mortgage—Reversion—Real Property Limitation Act,* 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2.] Time begins to run for the purpose of barring a foreclosure action on an equitable charge on a contingent reversionary interest in land only from the time the interest falls into possession. Hugill *v.* Wilkinson - - - - - 480

2. —— *Mortgage—Executor—Devastavit—Statute of Limitations—Trustees—Rents and Profits—Assets—Specialty Creditor*—3 & 4 *Will.* 4, *c.* 104.] Testator mortgaged freeholds, and died in May, 1867, having demised all his real and personal estate to A. and B. upon certain trusts, and having appointed them his executors. The executors without making provision for the mortgage debt, applied the whole of the personal estate in payment to simple contract creditors and beneficiaries. In 1869 A. died, and C. was appointed trustee in his place in 1871. The rents of the real estate were received by A. and B., and by B. and C., and after payment of the interest on the mortgage the balance was applied in accordance with the trusts of the will. The mortgaged property became an insufficient security, and interest having fallen into arrear, the mortgagees in 1886 commenced proceedings against B. and C., under which accounts of the testator's personal estate received by A. and B. or by B. alone, were directed, and also the usual accounts of the testator's real estate, including an account of rents and profits against B. and C. Accounts were accordingly carried in which B. and C. claimed credit for all payments and disbursements made to simple contract creditors and beneficiaries, and further that as to such of the payments as were made by A. and B. upwards of six years prior to the action any claim on a devastavit was statute barred, and that as to the rents and profits they were not liable to account for them at all:—*Held*, following *In re Marsden* (26 Ch. D. 783) on this point and distinguishing *In re Gale* (22 Ch. D. 820), that B. could not set up his own and A.'s wrongful payment by way of devastavit as a defence in order to claim the benefit of the Statute of Limitations.—That as to the rents and profits which had been received by B. or B. and C. jointly, that they were under 3 & 4 Will. 4, c. 104, assets by accretion liable under the circumstances for payment of creditors by specialty just as much as the real estate was assets under that statute. *In re* Hyatt. Bowles *v.* Hyatt - - - - 609

—— Refusal of company to transfer shares 458
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LOAN—To carry on business - - 238
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LOCO PARENTIS—Grandfather—Portions 183
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MANOR—Repair of sea-wall—Charitable purpose - - - - - 507
See Charity. 2.

—— Right of turbary—Inclosure—Rights of lord—Charitable purpose - - 520
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—— Validity—Heathen country - - 220
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MORTGAGE—*Power of Sale—Proviso that Power was not to be exercised without Notice to pay and Default for three Months—Waiver of Notice—Clause protecting Purchaser against Irregularity of Sale.*] A proviso relieving a purchaser under a power from inquiring as to the regularity of a sale does not protect a purchaser who knows of an irregularity which cannot have been waived:—*Quære* (per Bowen, L.J.), whether the same rule would apply where the irregularity was one which might have been waived.—*Parkinson* v. *Hanbury* (1 Dr. & Sm. 143; 2 D. J. & S. 450; Law Rep. 2 H. L. 1) followed.—A mortgage deed contained a covenant to pay at the expiration of six months, and a power of sale in the usual form, with a proviso that the power should not be executed until the mortgagee had given notice to the mortgagor to pay off the debt, and default should have been made for three months. The deed contained also the usual clause for the protection of purchasers in any sale purporting to be made under the power. The mortgagor subsequently incumbered his equity of redemption. Two months after the date of the mortgage the mortgagee gave notice to the mortgagor to pay off the debt, and seven months after the date of the mortgage sold the property to the defendant:—*Held*, in an action by the mortgagor to set aside the sale, that three months not having elapsed since default in payment of the mortgage debt,

MORTGAGE—*continued.*
the proviso had not been complied with, and the sale was invalid; and that as the purchaser must be taken to have known that the proviso had not been complied with, she was not protected by the protection clause.—*Held* also, that the mortgagor having incumbered his equity of redemption, and, therefore, not being in a position to waive the necessity of notice, the purchaser had no right to assume that there had been any such waiver. SELWYN *v.* GARFIT - - - C. A. 273

2. —— *Receiver—Foreclosure Absolute.*] After judgment for foreclosure absolute, the action being at an end, the plaintiff cannot obtain an order for the appointment of a receiver of the mortgaged property, even though the conveyance of the property to the plaintiff remains to be settled. WILLS *v.* LUFF - - - - - 197

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—— Demand— - - - - 110
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—— Objection to patent - - - 325
See PATENT. 3.

PARTNERSHIP—*Share of Profits—Advance to carry on Business—Bovill's Act* (28 & 29 *Vict.* c. 86), *s.* 5—*Garnishee Order—Equitable Charge —Notice—Priority.*] Participation in profits, although strong evidence, is not conclusive evidence of a partnership. The question of partnership must be decided by the intention of the parties to be ascertained from the contents of the written instruments, if any, and the conduct of the parties.—The Plaintiff advanced money to a contractor to enable him to carry out a contract with a railway company for the construction of a railway, and the parties executed a deed by which the contractor assigned to the Plaintiff all his machinery, plant, &c., and all shares and debentures he might receive from the company to secure the repayment of the loan. The deed contained the following provisions: (1) that the Plaintiff should receive 10 per cent. interest on the money advanced and 10 per cent. of the net profits of the contract; (2) that the contractor should apply all the moneys advanced in carrying on the works; (3) that if the contractor should become bankrupt the Plaintiff might enter and complete the works; (4) that the Plaintiff might sell the property in case of default, but that he should not sell the shares or debentures within twelve months after the completion of the contract; (5) that in calculating the net profits the contractor should be allowed to draw out £1000 a year for his services. Letters passed between the Plaintiff and the contractor in which the money advanced was spoken of as "capital" and "working capital," and expressions were used shewing that both parties had a common interest in the works:—*Held* (reversing the decision of Stirling, J.), that the stipulations in the deed and the expressions in the correspondence were all consistent with the object of securing repayment of the money advanced, and were not sufficient evidence of a partnership between the parties:—*Held* also (affirming the decision of Stirling, J.), that an action to enforce a security given by a trader who has become bankrupt is not an action to recover principal, profits, or interest within the 5th section of *Bovill's Act*, and may therefore be maintained by a person entitled to receive a share of the profits of a trader, although the other creditors of the trader have not been satisfied.—*Held* also (affirming the decision of Stirling, J.), that a creditor can only attach by a garnishee order such property of his debtor as the debtor could deal with properly and without violation of the rights of other persons. Therefore an equitable charge, obtained before a garnishee order, takes priority of the order, even where no notice of the charge was given. BADELEY *v.* CONSOLIDATED BANK [C.A. 238

PATENT—*Assignment—Royalties—Lapse of Patent—Implied Covenant to keep up Patent—Company—Winding-up—Damages.*] On the sale of a patent by the patentees to a limited company a deed of assignment was executed by the parties, by which, after a recital that the patentees had agreed to sell the patent to the company for £250 "and for the other considerations therein appearing," the patentees assigned the patent to the company absolutely: and after covenants for title by the patentees, including a covenant for quiet enjoyment of the patent "during the term subsisting therein," the company covenanted to pay to the patentees a royalty for every article "which should be manufactured or sold by the company" under the patent "while subsisting," and also a proportion of the profits arising from the manufacture or sale and from licenses granted for the manufacture or sale of articles to be manufactured under the patent "while subsisting." The deed contained no express covenant by the company to keep the patent on foot or to manufacture or sell articles under the patent. On the expiration of the first four years of the patent the company duly paid the first renewal fee under the Patents, Designs, and Trade-marks Act, 1883, but on the expiration of the fifth year they, through inadvertence, omitted to pay the

PATENT—*continued.*

second renewal fee within the time required by the Act and the rules thereunder, and consequently the patent lapsed. After an ineffectual attempt to obtain a private Act of Parliament to revive the patent, the company passed resolutions for a voluntary winding-up, and the patentees thereupon sent in a claim for damages for the loss, through the lapse of the patent, of the royalties reserved by the assignment, contending that a covenant to keep the patent on foot should be implied in the assignment:—*Held*, that no such covenant could be implied; and that, even if it could, the patentees could not obtain more than nominal damages, the company being under no obligation, either express or implied, to manufacture the patented articles and being no longer able to carry on business.—The doctrine of implying covenants in deeds discussed. *In re* Railway and Electric Appliances Company 597

2. —— *Disclaimer pending Action for Infringement—Terms of giving Leave to amend by Disclaimer—Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 19.] Pending an action for infringement of several patents, leave was given to the Plaintiffs to apply at the Patent Office to amend one of the specifications by way of disclaimer, and to give the amended specification in evidence at the trial, on the terms of the Plaintiffs paying all the costs of the action up to the time of leave being given, and waiving all claim to recover damages for infringements prior to the amendment. Gaulard *v.* Lindsay [C. A. 38

3. —— *Objections to Patent—Particulars of Objection — Discovery — Patents, Designs, and Trade Marks Act,* 1883 (46 & 47 *Vict. c.* 57), *s.* 32.] The Plaintiffs brought an action to restrain the Defendants, who were holders of various patents for electric accumulators, from threatening the Plaintiffs' customers with legal proceedings for infringement, and by their statement of claim alleged that the Defendants' patents were invalid. No specific statement had been made by the Defendants which patents they alleged to be infringed. The Defendants, who had not delivered a defence, applied for particulars of objections. North, J., ordered the Plaintiffs to deliver particulars of objections within a limited time after the Defendants had given to the Plaintiffs a list of the patents on which the Defendants intended to rely. The Defendants appealed, asking for an unconditional order on the Plaintiffs to deliver objections:—*Held*, that the order under appeal was right, but that the Defendants ought also to state that they relied on no other patents than those in the list, and that the Plaintiffs ought to undertake, when the list had been delivered, to amend their statement of claim so as to define the patents the validity of which they disputed. Union Electrical Power and Light Company *v.* Electrical Storage Company - C. A. 325

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POWER—*Appointment by Will—General Power —"Contrary Intention"—Wills Act* (1 *Vict. c.* 26), *s.* 27.] A marriage settlement made in 1840 reserved to the husband a general power of appointment by will "expressly referring to this power or the subject thereof." By his will (not referring to the power) he gave the residue of his property to trustees on certain trusts differing from those declared by the settlement in default of appointment:—*Held*, that the power was exercised by the will.—In ascertaining whether a testator has shewn an intention not to exercise by a residuary gift a general power of appointment reserved to him by a settlement made by himself the will only can be looked at.—Observations of Lord St. Leonards (Sugden on Powers (8th Ed. p. 306)) dissented from. *In re* Marsh. Mason *v.* Thorne [630

2. —— *Appointment by Will—Remoteness—Severable Proviso—Infant—Settlement—Ratification.*] Marriage settlements gave the intended husband and wife power by deed, or the survivor by deed or will, to appoint among children. The husband survived, and by will appointed the settled property among his three daughters equally, with a proviso that if at the time of his death any of them should be unmarried, her share should be held on trust for her for life, and after her decease, in case she should die leaving issue, as she should appoint, and in default of appointment, or in case she should not leave issue, on corresponding trusts in favour of his other children:—*Held*, that the trusts of the proviso were inseparable and totally void for remoteness, and that the absolute gift in favour of a daughter unmarried at the death of the testator prevailed.—By an ante-nuptial settlement, dated 1834, to which the wife (an infant) was party, her parents agreed, and the husband covenanted, that the husband and wife would, on her attaining twenty-one, convey her real estate to the uses of the settlement. In 1836 the wife having attained twenty-one, by deed duly acknowledged, in which the husband concurred, granted the real estate to the uses of the settlement:—*Held*, for the purpose of testing the validity of the exercise of a power, with reference to the rule against perpetuity, that the real estate was settled in 1834. Cooke *v.* Cooke - - - - - 202

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—— Will—Revocation of appointment - 456
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PRACTICE—*Administration Order—Discretion of Court—Direction by Testator that his Executors shall commence Administration Action—Rules of Supreme Court*, 1883, *Order LV., r.* 10.] A direction by a testator that his executors shall take proceedings to have his estate administered by the Court, does not deprive the Court of its discretion to refuse to make an order for administration; but weight ought to be given to such a direction in considering whether the order shall be made.—Where such a direction had been given, an order was made in Chambers, on the application of one of the executors, more than a year after the death of the testator, declaring that the estate ought to be administered by the Court, and directing an inquiry of what the estate then consisted. The Defendants (the other executor and a party beneficially interested) moved to discharge this order, on the ground that an order for administration was unnecessary, and would cause great and useless expense. North, J., refused to discharge the order, and his decision was affirmed by the Court of Appeal, who expressed their approval of the limited form in which the order was made. *In re* Stocken. Jones *v.* Hawkins [**C. A. 319**

2. —— *Appeal—Shorthand Notes of Evidence—Judge's Notes.*] When oral evidence taken in the Court below has to be considered on appeal, it is the duty of the Appellant to apply to one of the Judges of the Court of Appeal through his clerk to ask the Judge before whom the evidence was taken to send to the Court of Appeal a copy of the Judge's notes, and if this is not done the appeal will be ordered to stand over at the expense of the Appellant.—The Court of Appeal will not allow a shorthand note of evidence taken by a clerk of one of the solicitors in the action to be referred to. Ellington *v.* Clark, Bunnett, & Co. - - - - - **C. A. 332**

3. —— *Costs — Counsel's Fees — Refreshers — Appeal from Chancery Division—Rules of Supreme Court*, 1883, *Order LXV., r.* 27, *sub-rr.* 30, 37, 38, 48.] Where the hearing of an appeal from the Chancery Division occupies more than one day, the Taxing Master has a discretion to allow additional fees to counsel, in the shape of a daily allowance or otherwise, though no vivâ voce evidence has been adduced before the Court of Appeal, such fees not being treated as refreshers in the sense in which refreshers are dealt with on taxation as fixed sums, but as an allowance by way of addition to the original fees, on the ground that such fees have by miscalculation been fixed too low. This discretion, however, is to be exercised with jealousy, since there is not in such a case the same difficulty in fixing the proper fee at first as there is in cases where oral evidence is adduced, the probability of a case lasting long in argument being a matter which ought to be taken into account at the time of delivering the brief.—Order of North, J., affirmed.—*Svendsen* v. *Wallace* (16 Q. B. D. 27, 29, 30) explained. Easton *v.* London Joint Stock Bank - - **C. A. 25**

PRACTICE—*continued.*

4. —— *Costs of Motion — Trial — Judgment.*] On taxing costs under a judgment dismissing the action with costs, the costs of a motion by the Plaintiff which was adjourned or stood over to the hearing, and was then not brought on, would be included in the costs of the action. Gosnell *v.* Bishop - - - - - **C. A. 385**

5. —— *Defence—Pleading Matter since Writ—Rules of Supreme Court*, 1883, *Order XXIV., r.* 3—*Confession of Defence—Judgment for Costs.*] Defendants delivered a further statement of defence of matter arising since statement of defence put in. The Plaintiffs delivered a confession of the further statement of defence, and signed judgment for costs against the Defendants. The judgment for costs was set aside on terms of the Defendants withdrawing their further statement of defence. Bridgetown Waterworks Company *v.* Barbados Water Supply Company - - - 378

6. —— *Originating Summons—Jurisdiction—Question between Legal Devisees—Rules of Supreme Court*, 1883, *Order LV., rr.* 3, 5, 6.] Upon an originating summons under rule 3 of Order LV., of the Rules of Supreme Court, 1883, there is jurisdiction to determine such questions only as before the existence of that rule could have been determined under a judgment for the administration of an estate or execution of a trust.—Consequently, there is no jurisdiction upon an originating summons to decide a question arising between legal beneficial devisees under a will.—An objection to the jurisdiction upon an originating summons having been taken by the Defendants for the first time after the hearing of the summons had been adjourned into Court:—*Held*, that the objection ought to have been taken in Chambers, and that, though the objection was good, and the summons must be dismissed with costs, the Defendants could not be allowed the costs of the adjournment into Court. *In re* Davies. Davies *v.* Davies - - - - - 210

7. —— *Particulars—Discovery.*] Where the defendant has means of knowing the facts in dispute and the plaintiff has not, the defendant is not entitled to particulars until after he has given discovery.—The Plaintiffs, who were the executors of a married woman, sued her husband to establish that a quantity of the furniture and other chattels comprised in an inventory which had been taken of the goods in the Defendant's house, belonged to the separate estate of the wife. The husband applied for particulars of demand shewing which chattels they claimed:—*Held* (affirming North, J.), that the application ought to stand over till the husband had made an affidavit which of the articles belonged to the wife. Millar *v.* Harper [**C. A. 110**

8. —— *Particulars—Highway.*] In an action to restrain trespass on a road, the Defendants

PRACTICE—*continued.*
pleaded that it was a highway, and were ordered to amend their defence so as to shew the mode or title in or under which they claimed that the road had become a highway. The Defendants amended by alleging that the road had for many years been used by the public as of right and was a highway, having been dedicated to the public by the Plaintiff and her predecessors in title or some of them. Kay, J., on the application of the Plaintiff, then made an order that the Defendants should deliver to the Plaintiff full particulars of the nature of all acts of dedication relied on by the Defendants, and if the Defendants claimed by acts of dedication other than permissive user, particulars of such acts of dedication, with dates, and by whom made. The Defendants appealed:—*Held*, that under the present system the Court will oblige a party to give such information as to the nature of his case as is requisite to prevent his opponent from being taken by surprise at the trial, but that the order made went too far, and that the proper order was that if the Defendants relied on any specific acts of dedication, or specific declarations of intention to dedicate, whether alone or jointly with evidence of user, they should set forth the nature and dates of those acts or declarations, and the names of the persons by whom they were done or made. SPEDDING *v.* FITZPATRICK - - - **C. A. 410**

9. —— *Production of Documents—Privilege—Shorthand Notes of Proceedings.*] Transcript of shorthand notes of proceedings in open Court are not privileged.—*Nordon* v. *Defries* (8 Q. B. D. 508) observed upon. *In re* WORSWICK. ROBSON *v.* WORSWICK - - - - - **370**

10. —— *Security for Costs—Executor—Set-off.*] In an administration action P. was found to be heir-at-law. K., who claimed to be heir, appealed against this decision. P. then died, and K. revived against H., his executor and devisee in trust. H. applied for security for the costs of the appeal on the ground of K.'s proved insolvency. K. resisted on the ground that P. had been ordered to pay to him the costs of a previous appeal, which were of sufficient amount to be a security:—*Held*, that if P. had been the respondent this would have been a sufficient answer, but that H. being only a representative was entitled to be indemnified, and that security must be given. *In re* KNIGHT. KNIGHT *v.* GARDNER **C. A. 108**

11. —— *Security for Costs—Married Woman suing by Next Friend.*] A married woman by her next friend took out an originating summons for administration of a testator's estate, upon which an order was made without prejudice to any application by the Defendants as to security for costs. The Defendants applied, and, on the ground that the next friend was not a person of substance, an order was made staying proceedings till the Plaintiff had given security for costs. The Plaintiff appealed on the ground that a married woman could not be ordered to find security for costs:—*Held*, that although a married woman suing alone cannot be ordered to find security for costs on the ground of poverty, security had rightly been ordered in the present case, since the next friend alone was liable for them, and that the Plaintiff after obtaining a judgment by her next friend was too late to claim to sue alone. *In re* THOMPSON. STEVENS *v.* THOMPSON - - - - **C. A. 317**

12. —— *Service out of the Jurisdiction—Injunction.*] A summons by T. A. M., a manufacturer, resident in Scotland, for leave to register a trade-mark, was pending before North, J., and was opposed by J. M., also resident and carrying on a similar manufacture in Scotland, on the ground that the mark was similar to one belonging to J. M. J. M. applied for leave to issue a writ against T. A. M. for an injunction and damages, on the ground that T. A. M. was selling his goods in England in such a way as to lead the public to believe that they were J. M's goods. J. M. deposed that the same witnesses would be required on the summons and in the action, and that it would be most convenient and would save great expense if the action was brought in England, or that the summons and action could be tried together:—*Held* (affirming the decision of North, J.), that as an injunction in England could only be enforced against agents of T. A. M., and not against himself, leave ought not to be given to issue the writ, the matter being one which was better left to the Courts of Scotland. MARSHALL *v.* MARSHALL - **C. A. 330**

13.—— *Striking out Pleadings as unnecessary or embarrassing—Rules of Supreme Court,* 1883, *Order* XIX., *r.* 27—*Exercise of Discretion.*] In an action to enforce the compromise of a former action brought in assertion of rights of water, as to which disputes had arisen, Plaintiff will not be allowed, by setting out in his statement of claim the allegations as to his right and the corresponding liabilities of the Defendant which were contained in his former statement of claim, to relitigate the questions raised in the former action, and intended to have been finally disposed of by the compromise.—Such allegations were accordingly ordered to be struck out under Order XIX., r. 27, as embarrassing and unnecessary, though a motion for that purpose had been refused by the Court below. KNOWLES *v.* ROBERTS [**C. A. 263**

14. —— *Third Party Procedure—Liberty given to Third Parties—Rules of Supreme Court,* 1883, *Order* XVI., *rr.* 48, 53.] An action was brought against a railway company to compel them to retransfer stock which the Plaintiffs alleged to have been transferred out of their names by means of forged transfer deeds. The transferees were not made parties, but the company, under Order XVI., r. 48, served them with third party notices, claiming indemnity. The company, in their defence, set up all the grounds of defence that could be relied on against the Plaintiffs' claim. Some of the third parties desired to defend, and Mr. Justice Kay gave them liberty to appear at the trial and take such part as the Judge should direct. Two of them appealed from this order, asking that they might be at liberty to deliver a defence, appear at the trial, and put in evidence, and cross-examine the Plaintiffs' witnesses:—*Held*, that the third parties were not, under the old practice, necessary parties to the action, and that as the company had raised all proper grounds of defence, and was *bonâ fide* defending the action,

PRACTICE—*continued.*
the order gave the third parties all reasonable protection, and that the appeal must be dismissed, for that while, on the one hand, the Court ought to take care that the third parties had full opportunity of seeing that the questions in the cause were fairly tried, it ought, on the other hand, to take care that the Plaintiffs were not embarrassed and put to expense by unnecessarily allowing persons, who were not necessary parties to the action, to take all the same steps as if they had been made defendants. BARTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY [C. A. 144

15. —— *Transfer out of Court—Petition or Summons—Costs—Fund exceeding £1000—Title depending only on Proof of Identity and Birth of Applicant—Rules of Supreme Court,* 1883, *Order* LV., *r.* 2, *sub-r.* 1.] Where the title to a fund in Court depends only upon proof of the identity or the birth, marriage, or death of any person, the mere fact that the fund exceeds £1000 will not justify the making of an application for the payment or transfer of the fund out of Court by petition instead of by summons in Chambers.—*In re Rhodes* (31 Ch. D. 499) commented on. BATES *v.* MOORE - - - - - 381

16. —— *Trial by Jury—Rules of Supreme Court,* 1883, *Order* XXXVI., *rr.* 6, 7 (*a*).] Where, in an action brought in the Chancery Division to restrain a nuisance, either party applies for a trial by jury, he cannot claim a jury as a matter of right, but the application is one to the discretion of the Court under Order XXXVI., rule 7 (*a*), and he has not even such *primâ facie* right to a jury as to throw on the other side the burden of shewing that the case can be tried as well without a jury. TIMSON *v.* WILSON. FANSHAWE *v.* LONDON AND PROVINCIAL DAIRY COMPANY [C. A. 72

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RAILWAY COMPANY—*Railway ancillary to Dock—Railway Companies Act,* 1867 (30 & 31 *Vict. c.* 127), *ss.* 3, 4—"*Constituted by Act of Parliament for the purpose of making a railway.*"] A company formed by Act of Parliament for the purpose of making a dock, was afterwards authorized, by an Act of Parliament obtained by a railway company, to make a short piece of railway over its own land connected with the line of the railway company, and to work it for through traffic:—*Held*, by Chitty, J., and on appeal, by Cotton and Fry, L.JJ. (Lopes, L.J., doubting), that the dock company was a company "constituted by Act of Parliament for the purpose of making a railway," and so was a railway company within the meaning of the Railway Companies Act, 1867, and that a receiver and manager could therefore be appointed on the application of a judgment creditor:—*Held*, also, that the receiver and manager must be appointed of the whole undertaking of the company, and not merely of the railway belonging to it. *In re* EAST AND WEST INDIA DOCK COMPANY - - 576

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SETTLED ESTATES ACT—*Lease by Tenant for Life—Impeachment for Waste—Tenant for Years—Permissive Waste.*] A tenant for years is liable for permissive waste, and therefore a lease by a tenant for life under 40 & 41 Vict. c. 18, s. 46, exempting the lessee from liabilities for "fair wear and tear and damage by tempest" is void as "made without impeachment of waste."—In granting such a lease the tenant for life has a discretion as to what are proper covenants, and the lease will be void only when there is an outrageous omission of covenants.—*Nugent* v. *Cuthbert* (Sugden on Real Property, p. 475) distinguished. Davies *v.* Davies - - 499

SETTLED LAND ACT, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 21, *sub-s.* 2—*Incumbrance affecting Inheritance—Mortgage—Term.*] The proceeds of settled land sold by the tenant for life under the Settled Land Act, 1882, can be applied in paying off a debt secured by a mortgage of a long term. *In re* Frewen. Frewen *v.* James - - 383

2. —— (45 *&* 46 *Vict. c.* 38), *s.* 26—*Permanent Improvement of Settled Property—Scheme—Approval—Extra Expenditure—Application of Capital Money in Payment.*] In carrying out a scheme, which has been duly approved by the trustees, for improvements of permanent benefit to the settled estate, extra expenditure, not included in the contract forming part of the scheme submitted to the trustees, may be charged on capital moneys part of the settled estate in the hands of the trustees, where such extra expenditure is incidental to and has properly been incurred in a due execution of the scheme, and where the approval of the trustees has been general, and not limited to the particular amount mentioned in the contract. *In re* Bulwer Lytton's Will. Knebworth Settled Estates [C. A. 20

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SETTLEMENT — *Rectification* — *After-acquired Property—Wife's Power of Appointment—Agency of Wife's Father.*] A father living on affectionate terms with his daughter is the proper person to recommend and advise her, and her natural agent in matters relating to the preparation and provisions of her marriage settlement, and there is no occasion for any independent legal advice beyond that of the family solicitor who is preparing the settlement. If, however, the father is taking under the settlement a benefit from the daughter, she ought to be separately advised.—Per Cotton, L.J. The Court will not apply to the consideration of provisions in favour of volunteers contained in a contract founded on marriage, the principles on which it would act in considering provisions contained in a voluntary settlement.—The decision of Kekewich, J., reversed (Sir J. Hannen dissentiente).—*Smith* v. *Iliffe* (Law Rep. 20 Eq. 666) disapproved.—*Wollaston* v. *Tribe* (Law Rep. 9 Eq. 44) doubted. Tucker *v.* Bennett - - - - - C. A. 1
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STANNARIES COURT — *Stannaries Act,* 1869 (32 *&* 33 *Vict. c.* 19), *s.* 32—*Specific Enactment not repealed by General One—Security for Costs of Appeal—Consent by Counsel—Withdrawal of Consent—Mistake.*] Sect. 32 of the Stannaries Act, 1869 (32 & 33 Vict. c. 19), which requires a deposit of £20 to be made on all appeals from the Vice-Warden, is not abolished by the Judicature Acts and the General Orders made under them.—Some contributories appeared before the Vice-Warden to oppose the admission of certain claims in a winding-up. The Vice-Warden decided that the claims must be admitted. The counsel of the opposing contributories undertook not to appeal, and their costs were given them out of the estate. Before the order was passed and entered, they applied to have this undertaking omitted, on the

STANNARIES COURT—*continued.*
grounds that counsel could not give a consent not to appeal, that he could not give a consent after a decision on the merits, and that the consent was given by mistake, as the decision of the Vice-Warden turned on a resolution of the company which they had not seen, and that if they had known its terms the consent would not have been given. It appeared, however, that the resolution had been read in Court on a former day:—*Held*, that counsel had authority to consent not to appeal, and that as the opposing contributories had had an opportunity of becoming acquainted with the terms of the resolution, there was no such mistake as to entitle them to withdraw their consent. *In re* West Devon Great Consols Mine - - - - - **C. A. 51**

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SUCCESSION DUTY—*Leaseholds for life—Reversion.*] By the will of X. ecclesiastical leaseholds for lives of which Y.'s was the last, were settled upon trusts for Y. for life and over. A having acquired the life interest of Y., bought the reversion in the leaseholds from the Ecclesiastical Commissioners, and had been held to have purchased as trustee for the persons entitled under the will of X. Part of the land was represented by a sum paid into Court as compensation by a public body which had taken it under statutory powers. After the death of Y. the equitable interest under the will of X. had become vested absolutely in B., who, after satisfying A.'s lien for purchase-money, was entitled (inter alia) to the fund in Court:—*Held*, that B.'s title was, for purposes of duty, a title acquired under the will and not by purchase, and that succession duty was payable as on the death of Y. as predecessor.—*Fryer* v. *Morland* (3 Ch. D. 675) distinguished. De Rechberg *v.* Beeton - 192

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TRUSTEE—*Breach of Trust—Duty to enforce Payment of Trust Funds.*] It is the duty of trustees to press for the payment of the trust funds to them, and if they are not paid within a reasonable time to enforce payment by legal proceedings. And it is especially their duty to take action promptly if by the terms of the trust payment has been deferred to the expiration of a specified time.—The only excuse for not taking action to enforce payment is a well-founded belief on the part of the trustees that such action would be fruitless; and the burden of proving the grounds of such belief is on the trustees. *In re* BROGDEN. BILLING *v.* BROGDEN - - - C. A. 546

—— Consent to sale by tenant for life—Settled Land Act - - - - 334
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VENDOR AND PURCHASER—*Contract—Conditions of Sale—Completion, Date of—Interest, Payment of—Time of Essence of Contract—Requisitions—Defect of Title or Conveyance—Repudiation—Specific Performance—Tenant for Life—Power of Sale—Trustees of Settlement—Notice—Settled Land Acts* 1882 *and* 1884.] Where a contract for sale between a vendor and purchaser fixes a day for completion, and provides that if the purchase is not completed on that day the purchaser shall pay interest from that day until completion, time is not of the essence of the contract so as to entitle the purchaser immediately to repudiate the contract if, in consequence of a defect of conveyance merely and not of title, the vendor is unable on his part to complete the contract on the day fixed. Where the defect is simply one of conveyance and time is not of the essence of the contract, the purchaser is not entitled to repudiate after the day fixed by the contract for completion until he has given the vendor notice to remove the defect within a reasonable time, and the vendor has failed to do so.—Except in a case mentioned in sect. 15, a tenant for life has, under the Settled Land Act, 1882, an absolute power of selling the settled land without the consent or control of the trustees of the settlement, unless they have reason to believe that any intended exercise of the power is improper, in which case they may apply to the Court for directions under sect. 44. Consequently, neither the fact that at the time the tenant for life enters into a contract for sale there are no trustees of the settlement under the Act, nor, when there are any, the fact that no notice has been given them by the tenant for life, under sect. 45, sub-sect. 1, of his intention to proceed to a sale, prevents his making a statutory title. It is sufficient for the protection of the purchaser if by the time he comes to complete there are trustees under the Act to whom he may pay his purchase-money if required so to do by the tenant for life under sect. 22, and notice has been given them under sect. 45, sub-sect. 1; though under sub-sect. 3, a purchaser dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of the notice: but, *quære*, whether a purchaser incurs liability by completing his purchase with actual knowledge that no notice has been given.—The relative position and powers of a tenant for life and the trustees of a settlement under the Settled Land Acts, 1882 and 1884, considered. HATTEN *v.* RUSSELL - - - - - 334

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WATER COMPANY—*New River Company—Supply by Meter—"Dwelling-house"—15 & 16 Vict. c. clx., ss.* 35, 41.] A person requiring a supply of water in a house for domestic purposes and also for purposes for which no rate is fixed by the New River Company's Act, 1852, is not entitled, under sect. 41 of the Act, to require the company to supply by meter the water for domestic purposes as well as the water for other purposes.—Judgment of Kekewich, J., reversed.—*Semble*, that any house in which water is required for domestic purposes is a "dwelling-house" within the meaning of sect. 35 of the Act, though no person sleeps or takes meals there. COOKE *v.* NEW RIVER COMPANY - - C. A. 56

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See SETTLED ESTATES ACT.

WILL—*Absolute Gift—Executory Gift—Restraint on Alienation—Condition—Repugnancy.*] A testatrix gave certain real and personal estate "upon trust for my third son, J., his heirs and assigns; but if my said son should do, execute, commit or suffer any act, deed or thing whatsoever whereby or by reason or in consequence whereof, or if by operation of law, he would be deprived of the personal beneficial enjoyment of the said premises in his lifetime, then and in such case the trust hereinbefore contained for the benefit of my said son shall absolutely cease and determine, and the estates and premises hereinbefore limited in trust for him" should go and be held in trust for his wife, or, if no wife then living, for his children equally.—J. survived his mother, and was still living, a bachelor:—*Held*, that he took an absolute interest under the gift, and that the attempted executory gift over was void for repug-

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nancy.—Conditional gifts by way of restraint on alienation discussed. *In re* Dugdale. Dugdale *v.* Dugdale - - - - - 176

2. —— *Portions—Vested Interest—Gift over on Death without "leaving" any Child or Children surviving—Testator whether in loco parentis to Grandchildren.*] The artificial rules of construction adopted in *Emperor* v. *Rolfe* (1 Ves. Sen. 208), and subsequent cases upon settlements, where the Court has overcome express words in defeasance of an interest which by previous words of gift was vested in a child, may apply to portions given by will as well as to gifts in settlements, but where the gift by will is not one of portions to children or persons to whom the testator was *in loco parentis* the words of the will must be construed according to their grammatical meaning.—The mere circumstance that a testator, in a clause providing for the maintenance of future children of his daughter and only child, who was then unmarried, speaks of shares previously given to such children as "portions," is not sufficient to shew that he has placed himself *in loco parentis* to such children.—A testator gave personal estate, and the proceeds of sale of real estate, to trustees upon trust for his daughter and only child for life, and after her death for her children, who, being sons, should attain twenty-one, or being daughters, should attain that age or marry, with a gift over in case his daughter should "happen to die without leaving any child or children her surviving, or leaving such they shall all die without having obtained a vested interest in the said trust moneys, and without leaving any issue them him or her surviving." The daughter had five children. They all died unmarried in her lifetime, and only two of them attained twenty-one. Upon the death of the daughter:—*Held*, that the gift over took effect.—*Quære*, whether the construction would not have been the same if the instrument had been a settlement instead of a will. *In re* Hamlet. Stephen *v.* Cunningham - 183

3. —— *Revocation—Special Power of Appointment—Subsequent Revocation of Gifts "in favour of" Donee of Power.*] A testator by his will gave to his sister *H.* a life interest in a share of his residuary estate, and a special power of appointment by will over the capital of the share. By a codicil he revoked all devises and bequests whatsoever "in favour of" *H.*:—*Held*, that the power was revoked as well as the life interest. *In re* Brough. Currey *v.* Brough - - 456

4. —— *Satisfaction—Ademption—Legacy—Debt.*] A testator bequeathed his wife a legacy of £625. He then owed her that exact amount. The debt was paid off in his lifetime:—*Held*, that the sum was not payable as a legacy. *In re* Fletcher. Gillings *v.* Fletcher - 373

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